Aljoma Lumber, Inc. *and* Congreso de Uniones Industriales de Puerto Rico. Case 24–CA–8750, 24–CA–8793, 24–CA–8826, and 24–CA–8911

August 26, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On November 29, 2002, Administrative Law Judge George Alemán issued the attached decision. The Respondent and the General Counsel filed exceptions, supporting briefs, and answering briefs.

The National Labor Relations Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, as modified herein, and to adopt the recommended Order as modified and set forth in full below.[2]

This case involves allegations that the Respondent committed a number of unfair labor practices in the wake of a union organizing effort by some of its production and maintenance employees in late 2000 and following the certification of the Union as the employees' exclusive collective-bargaining representative in early 2001.[3] We reverse the judge on one issue.

The judge found that, in or around February 2001, after the Union had been certified, the Respondent violated Section 8(a)(5) and (1) by unilaterally changing employees' work hours without notifying the Union or bargaining with the Union over this change. The judge rejected the Respondent's affirmative defense that the complaint allegation pertaining to this conduct was time-barred under Section 10(b) on the grounds that the defense was untimely raised. For the reasons discussed below, we find, contrary to the judge, that the Respondent did timely raise the 10(b) defense. In addition, we find that the underlying complaint allegation was time-barred under Section 10(b). Accordingly, we shall dismiss this complaint allegation.

Background

The Respondent, a Florida corporation with operations in Ponce, Puerto Rico, is a seller of pressure-treated lumber that is used in home construction. The Union was certified as the exclusive collective-bargaining representative of the Respondent's production and maintenance employees on January 22, 2001.[4]

On or before February 6, Respondent General Manager Francisco Pomar changed the start and end times of the second shift—a shift on which unit employees were employed—from 8 a.m. to 5 p.m. to 9 a.m. to 6 p.m. Pomar testified that he made this change because he was experiencing difficulty getting employees on the second shift to work overtime to handle orders from Home Depot, one of the Respondent's largest customers; these orders typically came in either early in the morning or late in the afternoon. The Respondent admittedly did not notify the Union of this change prior to implementing it; nor did it bargain with the Union over the change.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We have modified the judge's recommended Order and notice to employees to correspond to our decision herein and to more closely conform to the standard language for our remedial provisions. In addition, we have modified the judge's recommended Order to provide that the notice be posted in both the English and Spanish languages. Bilingual notices are customary in Region 24. *Hospital Del Maestro*, 323 NLRB 93 fn. 2 (1997).

[3] The judge found, and we agree, that the Respondent did not violate Sec. 8(a)(3) and (1) of the Act by laying off employees Carmelo Almodovar, Josue Barrieras, Bernardo (Tito) Colón, Luis Maldonado, Luis Padilla, and Jose Valentín in September 2000. In adopting this finding, however, we rely only upon the credited testimony of Respondent Division President Bernardo Guerra and General Manager Francisco Pomar, which establishes that they had no knowledge of the employees' union organizational efforts when they made the decision to lay them off. Absent credible evidence of knowledge, the General Counsel failed to satisfy his initial burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), of demonstrating that the layoffs were discriminatorily motivated. See, e.g., *Tomatek, Inc.*, 333 NLRB 1350, 1353 (2001) ("[C]redible proof of 'knowledge' is a necessary part of the General Counsel's threshold burden, and without it, the complaint cannot survive."). In light of our dismissal of the complaint allegation on this ground, we find it unnecessary to pass on the judge's finding that, even assuming that the General Counsel met his threshold burden under *Wright Line*, the Respondent demonstrated that it would have laid off the employees even in the absence of their union activities.

In the absence of exceptions, we adopt the judge's findings that the Respondent violated Sec. 8(a)(1) by: threatening employees with job loss or discharge if they selected the Union to represent them; interrogating employees about their union activities; and promising to improve employees' benefits in order to discourage their support for the Union. Further, in the absence of exceptions, we adopt the judge's findings that the Respondent violated Sec. 8(a)(3) and (1) by: discharging employee Noel Cruz; issuing written warnings and/or suspending employees Josue Barrieras, Antonio Vega, and Juan Vázquez; and discharging Vega and Vázquez. Finally, in the absence of exceptions, we adopt the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally instituting and implementing a grievance procedure without notifying the Union and affording the Union the opportunity to bargain over this change.

[4] All dates are in 2001, unless otherwise noted.

On February 6, after the change in work hours had already been implemented, Pomar sent a letter to Union President Jose Alberto Figueroa notifying him that there had been a change in the working hours of certain unit employees and explaining why the change had been made. Figueroa responded by letter on February 8 to Pomar stating that the Respondent had improperly changed working hours without notifying the Union or bargaining with the Union over the change. Figueroa also demanded in the letter that the Respondent reinstate the original 8 a.m. to 5 p.m. schedule for the second shift and meet with the Union "to discuss the employment conditions and schedules for the workers." Pomar testified that the Respondent did ultimately reinstate the original schedule for the second shift.

Following the above incident, the Union filed several amended unfair labor practice charges with the Board,[5] including one on March 29 in Case 24–CA–8911, which alleged, inter alia, that, in March, the Respondent violated Section 8(a)(5) and (1) by unilaterally altering the terms and conditions of employment of employees Juan Alberto Vázquez, Bernardo Colón, Jose Valentín, Carmelo Almodovar, and Josue Barrieras without notifying and/or affording the Union an opportunity to bargain over the same. It is not clear from the record what particular conduct on the part of the Respondent formed the basis for this allegation.

It was not until August 10 that the Union amended the unfair labor practice charge in Case 24–CA–8911 to allege that the Respondent violated Section 8(a)(5) and (1) by changing unit employees' work hours without notifying the Union of the change or bargaining with the Union over the same. The August 10 allegation was subsequently included in the consolidated complaint issued by the General Counsel on August 24.

In its answer to the complaint allegation that its unilateral change in work hours was unlawful, the Respondent merely denied that any unlawful change had occurred; it raised no affirmative defenses. However, at the hearing, the Respondent, over the General Counsel's objection, sought to amend its answer to raise the affirmative defense that the allegation was time-barred under Section 10(b)—i.e., that the charge underlying the allegation was filed more than 6 months after the Union had received notice of the allegedly unlawful change. At the hearing, the judge allowed the amendment, subject to the parties further arguing their positions on the 10(b) issue in their posthearing briefs. In his decision, however, the judge found that the Respondent did not timely raise the 10(b) defense because it was asserted for the first time in the Respondent's posthearing brief. Accordingly, the judge concluded that the Respondent's unilateral change in the employees' work hours violated Section 8(a)(5) and (1). As explained below, we reverse.

Analysis

Section 10(b) of the Act provides that "no complaint shall issue upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board."[6] The Board has held that the 10(b) "statute of limitations" does not begin to run until the "aggrieved party has received actual or constructive notice of the conduct that constitutes the alleged unfair labor practice." *Concourse Nursing Home*, 328 NLRB 692, 694 (1999). Because it is a statute of limitations, 10(b) is an affirmative defense, which must be pled and which, if not timely raised, is deemed waived. *R. G. Burns Electric*, 326 NLRB 440, 446 (1998). Specifically, the 10(b) defense must be raised either in the pleadings or at hearing. See *Paul Mueller Co.*, 337 NLRB 764, 764 (2002).

In this case, the Respondent timely raised the 10(b) defense at the hearing, and the judge properly allowed the Respondent to amend its answer to include this defense. Thus, the judge erred in subsequently deciding that the Respondent did not timely raise the 10(b) defense. Accordingly, we now turn to consider the merits of the defense.

As evidenced by Figueroa's February 8 letter to Guerra, the record reflects that the Union had notice of the Respondent's unilateral change in unit employees' work hours no later than that date. However, the amended charge alleging, inter alia, that such conduct violated Section 8(a)(5) and (1) was not filed until August 10, more than 6 months after the Union received notice of the change. Thus, the Union's August 10 amended charge, as it relates to this particular allegation, was untimely under Section 10(b), and does not provide a basis for including the allegation in the complaint.

The General Counsel nevertheless contends that the change-in-work-hours allegation was properly included in the complaint because it was "closely related" to an allegation in a timely-filed charge, i.e., the Union's March 29 charge alleging that Respondent violated Section 8(a)(5) and (1) by unilaterally altering the terms and conditions of employment of unit employees Vázquez, Colón, Valentín, Almodovar, and Barrieras. In *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988), the Board set forth the following three factors for determining whether oth-

[5] The initial charge, filed on September 28, 2000, in Case 24–CA–8750–1 alleged, inter alia, that the discharges of Almodovar, Barrieras, Colón, Maldonado, Padilla, and Valentín violated Sec. 8(a)(3) and (1).

[6] The 6-month statute of limitations under Sec. 10(b) is precisely "six months"; it is not 180 days. See, e.g., *Elmo Greer & Sons*, 312 NLRB 703, 705 (1993).

erwise untimely allegations can be included in a complaint based on their close relationship to allegations in a timely-filed charge: (1) whether the otherwise untimely allegation involves the same legal theory as the allegation in the timely-filed charge; (2) whether the otherwise untimely allegation arises from the same factual circumstances or sequence of events as the allegation in the timely-filed charge; and (3) whether the respondent would raise the same or similar defenses to both allegations.

Applying the *Redd-I* principles to this case, we find that, while the two allegations may involve the same legal theory, the General Counsel has failed to satisfy his burden of showing that both allegations arise from the same factual sequence. As noted above, it is simply unclear from the record what factual circumstances gave rise to the March 29 charge. What little information is known about the March 29 allegation indicates that it involved conduct completely separate from and unrelated to the change in work hours. In this regard, the events occurred at different times—the change in work hours happened in February and the change in the terms and conditions of employment of employees Vázquez, Colón, Valentín, Almodovar, and Barrieras allegedly happened in March. Further, the events apparently affected different individuals: the judge found that the change in work hours affected employees on an entire shift, while the March 29 charge is specifically limited to the Respondent's treatment of five named individuals. Finally, with regard to the third *Redd-I* factor, because it is not clear what specific conduct on the part of the Respondent sparked the March 29 charge allegation, it cannot be said that the Respondent would raise the same defense to both allegations.

For all these reasons, we conclude that the record does not support a finding that the two allegations are closely related under the *Redd-I* test. Thus, the allegation that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing the work hours of unit employees was time-barred under Section 10(b). On this basis, we reverse the judge's finding that the Respondent violated Section 8(a)(5) and (1) in this respect, and we dismiss this allegation from the complaint.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below, and orders that the Respondent, Aljoma Lumber, Inc., Ponce, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally instituting and implementing a grievance procedure without first notifying Congreso de Uniones Industriales de Puerto Rico (the Union), which is the duly certified bargaining representative of the Respondent's employees in the appropriate unit described below, and affording it an opportunity to bargain over this change. The appropriate unit includes:

> All fingerlift operators and laborers, including treatment plant fingerlift operators and laborers, yard janitorial employees, equipment maintenance employees, and laborers, employed by the Respondent at its facility in Ponce, Puerto Rico, but excluding all merchandisers, electricians, wood treatment plant operator, all administrative personnel, clerical employees, secretaries, managerial employees, office janitorial employees, messengers, guards and supervisors as defined in the Act.

(b) Issuing written warnings to, suspending, discharging, or otherwise discriminating against employees for supporting or engaging in activities on behalf of the Union or any other labor organization.

(c) Coercively interrogating employees about their union sympathies, threatening employees with job loss, or promising to improve their benefits in order to discourage their support for the Union or any other labor organization.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request by the Union, cancel and rescind, if this has not already been done, the unilaterally established grievance procedure, and bargain with the Union, as the exclusive bargaining representative of its employees in the above-described unit, concerning this and other terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Cancel and rescind the March 16, 2001 unlawful warnings and/or suspensions issued to employees Josue Barrieras, Antonio Vega, and Juan Vázquez.

(c) Within 14 days from the date of this Order, offer employees Noel Cruz, Antonio Vega, and Juan Vázquez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights previously enjoyed.

(d) Make Noel Cruz, Antonio Vega, and Juan Vázquez whole for any loss of earnings and other benefits they may have suffered as a result of their unlawful discharges and/or suspensions as set forth in the remedy section of the judge's decision.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of

Noel Cruz, the unlawful warning issued to Josue Barrieras, and the unlawful warnings, suspension, and discharge of Antonio Vega and Juan Vázquez, and, within 3 days thereafter, notify these employees in writing that this has been done and that the unlawful actions will not be used against them in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at is facility in Ponce, Puerto Rico, in both the English and Spanish languages, a copy of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all employees and former employees employed by the Respondent at any time since October 28, 2000.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 26, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally institute and implement a grievance procedure without first notifying Congreso de Uniones Industriales de Puerto Rico (the Union), which is the duly certified exclusive bargaining representative of our employees in the appropriate unit described below, and affording it an opportunity to bargain over this change. The appropriate unit includes:

> All fingerlift operators and laborers, including treatment plant fingerlift operators and laborers, yard janitorial employees, equipment maintenance employees, and laborers, employed by the Respondent at its facility in Ponce, Puerto Rico, but excluding all merchandisers, electricians, wood treatment plant operator, all administrative personnel, clerical employees, secretaries, managerial employees, office janitorial employees, messengers, guards and supervisors as defined in the Act.

WE WILL NOT issue you written warnings, suspend you, or otherwise discriminate against you for supporting or engaging in activities on behalf of the Union or any other labor organization.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT coercively interrogate you about your union sympathies, threaten you with job loss, or promise to improve your benefits in order to discourage your support for the Union or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, on request from the Union, cancel and rescind the unilaterally established grievance procedure.

WE WILL, on request from the Union, bargain with the Union, as the exclusive bargaining representative of our employees in the above-described unit, concerning grievance procedures and other terms and conditions of employment, and WE WILL embody any understanding that is reached in a signed agreement.

WE WILL cancel and rescind the March 16, 2001 unlawful warnings and/or suspensions issued to employees Josue Barrieras, Antonio Vega, and Juan Vázquez.

WE WILL, within 14 days from the date of the Board's Order, offer employees Noel Cruz, Antonio Vega, and Juan Vázquez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights previously enjoyed.

WE WILL make Noel Cruz, Antonio Vega, and Juan Vázquez whole for any loss of earnings and other benefits they may have suffered as a result of their unlawful discharges and/or suspensions.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Noel Cruz, the unlawful warning issued to Josue Barrieras, and the unlawful warnings, suspension, and discharge of Antonio Vega and Juan Vázquez, and WE WILL, within 3 days thereafter, notify these employees in writing that this has been done and that the unlawful actions will not be used against them in any way.

ALJOMA LUMBER, INC.

Debra Sepulveda, Efrain Rivera Vega, Jose Luis Ortiz, & Marisol Ramos, Esqs., for the General Counsel.
Jorge Sala & Polonio Garcia, Esqs., for the Respondent.
Ivan Santos, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE ALEMAN, Administrative Law Judge. Pursuant to unfair labor practice charges and amended charges filed by Congreso de Uniones Industriales de Puerto Rico (the Union) between September 28, 2000, and August 10, 2001, the Regional Director for Region 24 of the National Labor Relations Board (the Board), on August 24, 2001, issued a consolidated complaint and notice of hearing alleging that Aljoma Lumber, Inc. (the Respondent), had violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). In its answer to the complaint dated September 26, 2001, the Respondent denied having engaged in any unlawful conduct.

A trial in this matter was held in Hato Rey, Puerto Rico, between April 8–12, and on June 5, 2002, at which all parties were given an opportunity to call and examine witnesses, to submit relevant oral and written evidence, to argue orally on the record, and to file posttrial briefs. On the basis of the entire record in this proceeding, including my observation of the demeanor of the witnesses, and after considering briefs filed by the General Counsel and the Respondent,[1] I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Florida corporation, maintains an office and place of business in Ponce, Puerto Rico, where it is engaged in the wholesale sale and distribution of lumber and other related products. During the 12-month period preceding issuance of the complaint, the Respondent purchased and caused to be shipped to its Ponce facility from points and places outside the Commonwealth of Puerto Rico goods and materials valued in excess of $50,000. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Allegations

The complaint alleges that the Respondent, through Division President Bernardo Guerra, Credit Manager Buenaventura Pagan, General Manager Francisco Pomar, and Patio Manager Walter Valenzuela,[2] violated Section 8(a)(1) by threatening employees with job loss or discharge if they selected the Union to represent them; interrogating employees about their union activities; telling employees it would be futile to select the Union as their representative; and promising employees health plan benefits and salary increases if they voted against the Union in a scheduled Board election.

It further alleges that the Respondent violated Section 8(a)(3) and (1) by discharging on September 27, 2000, employees Jose Valentin, Luis Maldonado, Carmelo Almodovar, and Josue

[1] Reference to arguments contained in the parties' respective briefs are identified herein as "GC Br." for the General Counsel's brief, and "R Br." for the Respondent's brief, followed by the page number(s.) Reference to admitted exhibits are identified as "GC Exh." for a General Counsel exhibit, and "R. Exh." for a Respondent exhibit, followed by the exhibit number. Finally, reference to testimonial evidence is identified by the transcript volume (e.g., Roman numerals I–V) and page number(s.)

[2] The Respondent in its answer admits that Guerra, Pagan, and Pomar are supervisors and agents of the Respondent within the meaning of Sec. 2(11) and 2(13) of the Act. As to Valenzuela, the Respondent admits only that he has been a statutory supervisor since February 1, 2001, but denies that Valenzuela was a supervisor or agent prior thereto.

Barrieras; discharging on September 28 employees Bernardo (Tito) Colon and Luis Padilla; discharging employee Noel Cruz on October 28, 2000; issuing written warnings and/or suspensions to Barrieras and to employees Antonio Vega and Juan Vazquez on March 16, 2001; and by thereafter discharging Vega and Vazquez, respectively, on March 23, 2001 and April 16, 2001.

Finally, the complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the work schedules of employees represented by the Union, and by establishing a grievance procedure for said employees without giving the Union prior notice or an opportunity to bargain over said changes.

B. Factual Background

1. Respondent's operations, business downturn, and September 27 layoffs

The Respondent, as noted, is a Florida-based corporation which, between 1986 and 1987, opened up a facility in Ponce, Puerto Rico. At the time, its principal product in Puerto Rico was the sale of pressure-treated lumber used for building homes. Division President Guerra testified that by the year 2000, Respondent's customer base had increased to some 460 customers, and sales had reached $40 million. Its primary customers at the time were Home Depot and Masso.[3] With its sales growth came an increase in personnel.[4] According to Guerra, the Respondent's rapid sales growth during this period was in large measure due to the great property damage caused by Hurricane Georges which struck the island in 1999. However, according to Guerrra, after the hurricane, the Puerto Rican economy took a downturn which, in turn, affected the Respondent's sales, which he claims dropped to about 50 percent of what it had been. Guerra claims that one factor which detrimentally affected the Respondent's sales was the refusal by insurance companies to insure low-income wood homes, prompting builders to switch from wood to concrete to build homes. He further explained that his lumber business had also been undermined by the availability of low-interest loans, and the insurability of concrete-built homes which made the purchase of concrete built homes more affordable.

Guerra testified that in an effort to offset the decrease in sales and to avoid having to layoff employees, he began, with the required approval of the Florida home office, introducing new products. Thus, he claims that the Respondent added steel, "rebar," South A.m.erican plywood, and some 17 other items to its product line. Some of the new products apparently proved successful while others did not. However, Guerra claims that by July 2000, the Respondent's main office in Florida concluded that the introduction of new products was not the right approach to take to stem the decline in sales, and that a decision was made to reduce the number of customers from 460 to 80, a process which Guerra explained took more than a year to complete (IV:731). Guerra explained that by June 2000, sales to Home Depot were at a minimum, presumably due in part to the fact that Home Depot was, at the time, in the process of acquiring Masso's operations. Respondent's sales to Masso likewise dropped off or stopped completely during this same time period because of the anticipated sale of its operations to Home Depot, which, according to Guerra, occurred sometime after September 2000. Guerra claims that he continued looking for ways to reduce the Respondent's overhead costs, and that he was spurred on in this regard by repeated calls from Florida headquarters, principally from the Company's Chief Financial Officer, David Flinn, as well as from its owner, Jose Lamas, insisting that he consider reductions in other areas of the company. He testified that the only other area where cuts could be made was in personnel, noting in this regard that other areas such as rental costs and utilities were fixed and could not be reduced.

According to Guerra, around July 31, he was instructed by Florida's corporate headquarters to reduce expenses and personnel consistent with Respondent's then level of sales, and, in early September, was specifically told that a reduction in the level of personnel would be needed by the end of the month (IV:732). His testimony in this regard is generally corroborated by Flinn who testified that the Respondent was expected to carry out a reduction in force "by the end of September" (IV:671). Guerra claims that after submitting to headquarters, at their request, a report identifying each employee's responsibility at the Respondent's facility, the Respondent was told that it had 14 employees more than it needed for the level of business it was doing. Based on the above instructions and directives from headquarters, Guerra claims he decided to take the initiative and, on September 26, met with and informed General Manager Pomar that "a group of people" had to be let go. (IV: 733.) Guerra testified that the decision on which employees to retain was made on the basis of their relative skills, and that he and Pomar decided that those employees with the greatest experience and skills would be kept on. (IV:729; 749). On the basis of that evaluation, alleged discriminatees Bernardo Colon, Carmelo Almodovar, Jose Valentin, Luis Maldonado, Josue Barrieras, and Luis Padilla were chosen for layoff. Guerra claims he then hand-drafted a dismissal letter which he gave to Pomar to be finalized and delivered to the affected employees the following day (see GC Exh. 5 and attachments). The dismissal letters advised the employees that the Respondent was terminating their services as of September 27, "because of economic reasons due to the decrease in sales."

Pomar corroborated Guerra's testimony regarding their September 26 meeting. He testified to meeting with Guerra in the latter's office in the afternoon of September 26, and that a decision was then made as to which employees were to be laid off. Pomar claims that in early September, Guerra mentioned to him that he had been instructed by headquarters in Miami to reduce his employee complement by 14 employees by the end of the month, and that the Respondent had to decide which employees to let go. During their September 26 meeting, Pomar claims he and Guerra decided to retain the most skilled employees and that, on the basis of that criteria, employees Colon, Almodovar, Valentin, Maldonado, Barrieras, and Padilla were selected for

[3] R. Exh. 17 contains a list of customers and total sales' figures for each customer for the period August 1999–March 2000, and for the individual months of April through July, 2000.

[4] The Respondent's workforce included forklift operators; laborers; yard janitorial employees; equip.m.ent maintenance employees; sales personnel, clerical, administrative, and secretarial employees.

layoff. According to Pomar, that same afternoon he had final copies made of a draft discharge letter prepared by Guerra for delivery to the affected employees the following day, September 27. (GC Exh. 5.) Almodovar, Valentin, Maldonado, and Barrieras received their discharge notices on September 27, while Colon and Padilla, who were out for medical reasons on September 27, were given their discharge notice on September 28.

Buenaventura Pagan was employed by Respondent in various capacities from October 1, 1998, until discharged by Guerra on January 8, 2001.[5] Called as a witness by the Charging Party, Pagan testified that he participated in the September 27 layoff decision, and that he had a discussion with Guerra about the Union on the morning of September 27 before the layoff decision was made. Regarding this alleged prelayoff discussion, Pagan testified that on September 27 he was out of the office visiting clients when he received a call from Guerra telling him that something had happened and requesting Pagan to return to the office. Pagan purportedly arrived at the office between 12:30 and 1:00 p.m. and met with Guerra who proceeded to tell him about a fax he had just received from the Union advising him of the employees' interest in organizing (GC Exh. 2). After showing and discussing the fax with him, Guerra purportedly told Pagan at this meeting that neither he (Guerra) nor Aljoma's corporate offices in Miami wanted a union, and that he would prefer to close down the company rather than have a union. Guerra also mentioned to Pagan that he had spoken with the Union's president, Jose Figueroa, earlier that morning and had told Figueroa the same thing he had just told Pagan. Pagan purportedly advised Guerra that he had made a mistake in saying such things to Figueroa (III:514). Guerra denies having any such discussion with Pagan, and testified that when he, Guerra, received the Union's letter, Pagan no longer worked in Respondent's office but instead had been assigned by Miami headquarters to collections duty on the road. (IV:765–766.)

Regarding his alleged involvement in the layoff decision, Pagan testified that following his brief conversation with Guerra, he, Pomar, and Guerra, at the latter's request, went to Pagan's office to draw up a list of employees that were to be let go that day, and to draft the dismissal letter that would be given to them. Asked why the terminations were taking place that day, Pagan explained that since the Respondent was already going through a "reorganization" and had been planning to discharge employees prior to September 27, it decided to use the Union's letter as a reason for implementing the layoffs that day. Pagan admits being told by Guerra sometime prior to the September 27, layoffs that, due to the Company's poor financial situation, layoffs would continue to occur until the Company arrived at the number of personnel needed to meet its existing sales volume. He claims, however, that while the Respondent was indeed planning to conduct layoffs, no specific date had been set for the layoffs that occurred on September 27. Pagan testified that while in his office, the three of them drafted a dismissal letter, and that the final copies of the letter were prepared by him on his computer and given to Pomar for distribution to the affected employees later that day. (III:515–516; 529–530.) Pagan claims that the letters were back-dated to September 26, on instructions from Guerra.

Pagan's testimony as to his involvement in the September 27 layoff of the six alleged discriminatees and related matters is, as noted, contradicted by Guerra and Pomar, both of whom testified, contrary to Pagan, that the layoff decision was made by them alone, that said decision was made on September 26 and not, as claimed by Pagan, on September 27 and that Pomar, not Pagan, prepared the layoff letter in his (Pomar's) office, not Pagan's office. I credit Guerra's and Pomar's mutually corroborative testimony over Pagan's unsubstantiated claims. From a demeanor standpoint, Pagan came across as an unreliable witness whose testimony lacked the ring of truth. His questionable performance as a witness, coupled with the lack of any corroboration, renders his testimony as to the events surrounding the September 27 layoffs, including his alleged discussion of the Union's September 25 letter (first received by Respondent on September 27) with Guerra, and his alleged involvement in the decision, not worthy of belief. In fact, I believe that Pagan's testimony in this regard was a pure fabrication that could very well have been motivated by animosity stemming from his discharge by Guerra, and his pending lawsuit against Respondent. Accordingly, I find that, as testified to by Guerra and Pomar, the Respondent's decision to layoff alleged discriminatees Colon, Almodovar, Valentin, Maldonado, Barrieras, and Padilla was made on September 26, 2000, and implemented the next day by Guerra and Pomar alone, that Pagan had no involvement in that decision, and that Guerra never discussed with Pagan the substance of the Union's letter.

Almodovar, a laborer and a forklift operator, began working for Respondent sometime in 1998 or 1999. After working for nine months, he quit but was rehired in July 2000. He testified that on the afternoon of September 27, while he was working, admitted Supervisor Jimmy Alvarado approached him with several envelopes in hand, one of which he gave to Almodovar stating that the envelope contained his discharge notice. Although he did not open the envelope right away, Almodovar did ask Alvarado if the discharge was immediate or was he allowed to finish his shift. Alvarado stated it was effective immediately. After leaving, Almodovar contacted Colon and gave him the letter. (II:206–207.)

Valentin recalls that around 3:45 p.m. on September 27 he was in the wood cutting area when Alvarado approached and handed him a discharge letter. When he asked why he was being discharged, Alvarado explained that it was for economic reasons and apologized to Valentin for having to give the discharge notice. Valentin told Alvarado that this was not his problem, and continued working until 4:30 p.m.

Maldonado worked as a forklift operator for Respondent from 1996 until September 27 when he was laid off sometime

[5] The record reflects that Pagan initially served as Respondent's general manager until around August 2000 (GC Exh. 33; III:510), and as credit manager until his discharge on January 8, 2001, as admitted in Respondent's answer (see, GC Exh. 1[k]; 1[p]). At the time of the hearing, Pagan had a lawsuit pending against the Respondent, the subject of which was not revealed (III:549.)

in the early afternoon.[6] He recalls that on September 27 the shift supervisor approached him and gave him an envelope with a letter stating he was discharged for economic reasons. He testified that he did not understand why he was being laid off for economic reasons since, in his view, there was plenty of work available, noting in this regard that he and other employees had been working 40 hours a week plus overtime. The overtime, he estimated, averaged out to about 6 or 7 hours a week. Maldonado testified that soon after Hurricane Georges struck the island in September 1998, the Respondent increased its workforce, but that by March 1999 the Respondent began laying off personnel and continued doing so through the summer of 2000. (II:294–295.)

Barrieras testified to being hired in February 1998, and working as a forklift operator until he was laid off in February 2000 for economic reasons. He claims that he was rehired by Pomar after telling the latter he needed to work, and continued working until laid off on September 27. He had little recollection of the circumstances surrounding his September 27, layoff. Thus, while recalling that he was discharged in September 2000, he could not recall the date it occurred. He recalled only receiving a letter from Alvarado advising him he was being discharged.

Padilla recalls reporting for work on the morning of September 28, and punching his timecard. He testified that as he headed to his workstation, Alvarado approached him and handed him a letter. Padilla said he then read the letter which advised him that for economic reasons, the Respondent was no longer in need of his services. Padilla explained that the day before, he had gone to a medical appointment and consequently was not at work. He did, however, learn on September 27, that other employees had been discharged. (II:226, 232.)

Colon, as noted, was also out for medical reasons on September 27. The following day, September 28, he reported for work at 6:30 am as was customary, and was about to clock in when Alvarado approached and told him not to do so. After asking Colon to wait at the timeclock, Alvarado returned a few minutes later with a white envelope containing a discharge letter and told Colon he was sorry. On reading the discharge letter, Colon asked what had happened, and requested to speak with Pomar. Colon then went to see Pomar, and on entering the latter's office, asked Pomar what the letter meant. Pomar asked if Colon had read the letter, at which point Colon claims he questioned if he was truly being discharged for economic reasons. Pomar, according to Colon, responded, "Take it as you wish." Colon then simply shook Pomar's hand and, as he was leaving, told Pomar, "Thank you very much for your words." Pomar purportedly replied, "This is for you to learn." Asked if he recalled anything else being said during his conversation with Pomar, Colon claims that at one point during their discussion, Pomar stated that the Union "did not govern, did not control anything at the Company, and that he would hire whomever he wanted." (I:143–145.)

The record reflects that three of the six laid off employees—Colon, Barrieras, and Almodovar—were later recalled on March 12, 2001, on a temporary, part-time basis to do "rebar" and "repackaging" work (I:148–149). All three, however, were again dismissed on April 16, 2001. Colon testified that when discharged on April 16, 2001, then admitted Supervisor Walter Valenzuela,[7] told him, as well as Barrieras and Almodovar, both of whom, according to Colon, were with him at the time, not to worry as they would be recalled within 2–3 days. When discharged, each was given a letter stating their services as temporary employees was being terminated (see GC Exh. 5). Colon, however, was not recalled. (I:149–150.)

Regarding his April 16, discharge, Almodovar testified that he, Colon, and Barrieras were called to Valenzuela's office that day and told they were being discharged. Almodovar claims that when he asked why he was being discharged, Valenzuela replied that the Respondent did not have to give him a reason as he was a temporary employee (II:212–213). Almodovar was recalled on three separate occasions. The first recall occurred a few days later and lasted some 2–3 months; the second about 2–3 weeks, and the third until September 2001 at which time he was discharged. Barrieras testified he was recalled in February 2001 and not, as Colon states, on April 16, 2001, and has continued in the Respondent's employ through the date of the hearing. (III:571; 584.)

Padilla testified that the Union called him back to work sometime in March 1991. He apparently chose not to return because he was already working a full 40 hours per week elsewhere, and the Respondent was only offering him a temporary job working 4 hours per day. He claims that had the Respondent offered him a 40-hour workweek, which it did not, he would have returned. (II:233.) Valentin was also offered reinstatement in March 2001 but refused to return to work because of a back injury he had sustained (II:248). Maldonado could not recall ever being asked to return to work in March 2001 either by the Respondent or the Union. He testified that he was, in any event, already working at the time at a painting firm (II:294).[8]

2. The organizational drive and related matters

The record reflects that also in September, certain of Respondent's employees, led by alleged discriminatee Colon, began expressing an interest in organizing themselves. Colon, a maintenance employee, testified that he developed an interest in organizing the Respondent's employees after overhearing Pomar ask a supervisor, Sepulveda, if the latter had yet signed the medical certificate which would provide Sepulveda with Company-sponsored medical coverage. Colon became upset because while the Respondent was apparently willing to provide medical insurance for supervisors, it was not doing so for other employees like himself. Colon then had a conversation with employee Antonio Vega and, after informing Vega of what he had

[6] Maldonado claims that when first hired in 1996, he was asked to sign a document acknowledging that the Respondent did not accept unions, and that the signed document was maintained in the company's files (II:291.) Alleged discriminatee Noel Cruz provided similar testimony, although he was vague as to when he might have been asked to sign such a document. (II:258.)

[7] * * *

[8] The complaint does not allege any wrongdoing arising from the failure to recall Colon following his March, 2001 dismissal, or from the repeated dismissals and recall of Almodovar or any other employee during this time period.

overheard, told Vega that employees needed to organize themselves into a union in order to obtain medical insurance and salary increases. Vega agreed. Colon went on to discuss the matter with other employees and, soon afterwards, called union president, Jose Figueroa, and asked if he was willing to organize a group of approximately 21 of Respondent's employees. Figueroa agreed to do so and informed Colon that he would be sending Colon some union "representation" cards for employees to sign.[9] On receipt of the cards, Colon went back to the employees and, after advising them to give serious consideration to their decisions, distributed the cards for them to sign. Colon admits advising employees during his card-signing activity that their efforts to unionize was to be kept secret from the Respondent because if Guerra or Pomar found out, he, Colon, might be fired (I:175). The card-signing activity, according to Colon, took place during the employees' lunch hour at a hot dog or lunch stand located off Company property. There is nothing in the record to suggest that Colon's activities in this regard were observed by any of Respondent's supervisors or managers.

Colon received signed cards from eight employees that day,[10] and after informing Figueroa by phone of the signed cards, personally delivered them to him either on September 22 or 23.[11] Figueroa corroborated Colon's testimony regarding their initial and subsequent contacts. Vega likewise confirmed having a conversation with Colon in September about the Union. (I: 43–45; 334.) All three testified that after the cards were signed, Figueroa held a meeting of employees at a location named "La Cueva del Pirata," situated near the beach in town of Ponce where he discussed their rights and the likelihood that an election might be held. Figueroa claims that at one of his employee meetings, employees, including Colon, expressed concern about being fired or laid off because of their union activities (I:101–102).

By letter dated September 25, but faxed to Respondent on the morning of September 27,[12] Figueroa notified Guerra that the Union represented a majority of the Respondent's "production and maintenance" employees, and invited Guerra to negotiate with the Union over the employees' terms and conditions of employment within 10 days of receipt of his request (GC Exh. 28). According to Figueroa, Guerra called him on September 27,[13] and, after identifying himself, asked what Figueroa's September 25, letter was all about. Figueroa explained that the Respondent's employees were interested in having the Union represent them and in having it negotiate a collective-bargaining agreement on their behalf. Guerra purportedly then asked if he was speaking with a union, and when Figueroa replied that he was, Guerra stated, "Well, I'm not going to deal with unions. I'd rather close the business." Guerra, according to Figueroa, further added that there once had been a union at the company when it was previously under Japanese ownership, but that it had shutdown. Figueroa purportedly told Guerra that he should not have such an attitude, that the Union was a serious organization that takes a company's financial condition into account when conducting negotiations. Figueroa claims that Guerra repeated that he would not deal with unions, and that they would not be talking to each other any more because from then on, the Respondent would speak through its attorney. (I:51–52.)

Guerra testified he received Figueroa's September 25 letter by fax on the morning of September 27, and at first believed it to be a joke. He decided to call the name and number on the letter and, when Figueroa came on the line, asked if the letter was authentic. According to Guerra, Figueroa confirmed that the letter was authentic, and told Guerra that certain of the Respondent's employees had consulted him about organizing themselves into a union. When Figueroa tried to explain the benefits of unionization to Guerra, the latter stated that Figueroa did not need to explain, and that the next conversation Figueroa would have with Respondent would be through its attorney. Guerra, it should be noted, was not asked about, and consequently did not deny, Figueroa's assertion that he, Guerra, insisted he would not deal with a union and would instead prefer to close down the facility.

Guerra testified that after speaking with Figueroa, he notified headquarters in Florida about the September 25, letter, and spoke with Flinn. He informed Flinn that he needed to retain an attorney to represent the Respondent, explaining that he did not know how serious the matter was, but that it did appear that there was "going to be an organization in the company." Guerra did receive authority to retain an attorney. After speaking with Flinn, Guerra began making inquiries of employees and guards to find out what they knew or had heard about the Union. He admits asking employee Jose ("Jayuya") Gonzalez if he had heard anything about a union being formed at the company. Jayuya responded that he did not know anything about it. Guerra explained that he went to Jayuya because the latter kept him informed about everything that happened at the company, and that if a union was being formed, Jayuya would have known and notified him of it. Guerra also asked his then head of security, Valenzuela, if he had heard anything about a union being formed. Valenzuela replied that he had not, and indicated he would "check with the guards, because he had not heard

[9] The cards in fact were union authorization cards since, by signing the card, the employee was agreeing to become a union member and authorizing the Union to represent the employee for collective bargaining purposes (see GC Exh. 11 through 18.)

[10] The eight card signers included Colon himself, as well as alleged discriminatees Barrieras, Padilla, Valentin, Almodovar, Maldonado, and employees Vega and Noel Cruz Quiles.

[11] Colon seemed unsure about when he might have given Figueroa the cards, stating at first that it was either on September 22 or 23, but adding that he (Colon) "received" or picked up the cards on either of those dates (Tr. 140.) As all the signed cards he received are dated September 20, I find it more likely than not that September 22 or 23 is when he delivered the cards to Figueroa, and not when he received them.

[12] The Union also sent a copy of the letter to the Respondent by certified mail on September 27 (GC Exh. 28.)

[13] Although on direct examination Figueroa stated Guerra's call occurred on September 27, on cross-examination he seemed unsure about the date. (I:50; 100.)

anything about it."[14] (IV:732–744.) Guerra also admits campaigning against union representation. Thus, he testified that he met individually with each employee during which he told them what exactly a union was, and of the pros and cons of unionization, and assured employees that it was their right to decide whether or not to become unionized (IV:776).

Figueroa testified that when the employees notified him of their layoff, he sent Guerra a letter dated September 28, confirming their previous day's phone conversation (including the remark Guerra allegedly made about closing the facility), advising that the layoff of the six individuals the day before was "a gross violation of Federal law," and demanding that they be immediately reinstated and reimbursed for lost wages. In his letter, Figueroa identified Colon as a union leader, and also asked Guerra sit down and bargain with the Union (GC Exh. 3). Guerra admitted receiving the September 28 letter, but made no effort to refute or deny Figueroa's assertion therein that he, Guerra, had threatened during their phone conversation "to close the Company." I credit Figueroa's unrefuted testimony, as confirmed by his September 28 letter, that Guerra did indeed threaten to close the facility rather than have to deal with the Union. Figueroa also wrote Guerra a letter dated October 3, which the latter admits receiving, in which Figueroa identified 17 of the Respondent's employees, including the six laid off on September 27, as well as named discriminatees Noel Cruz, Josue Barrieras,[15] Antonio Vega, and Juan Vazquez, as Union "leaders" and supporters. (See GC Exh. 4[B].)

Pagan testified that at a meeting with Pomar and Guerra sometime either in October or November, he was assigned the task of going to employees and questioning them about their union sympathies. He claims he was chosen because of his greater access to employees.[16] Pagan recalls having personally spoken to only two employees, Orlando Morales and another individual identified only as "Saul," about the Union.[17] However, he testified that he, in fact, only questioned Morales on whether he was "for or against the Union," but did not question "Saul" because it was his understanding that "Saul" already favored the Union (III:519–521). Pagan provided no details as to his encounter with Morales. Morales, it should be noted, had already been identified by the Union, in its October 3, 2000 letter to Guerra, as a union leader and supporter. The record, however, does not reveal if Pagan knew of Morales' involvement with the Union.

Forklift operator, William Sanabria, testified that on October 11, 2000, he was walking past the mechanics area when a mechanic, identified by Sanabria only as "Juan," and another coworker identified only as "Alexander," asked Sanabria if he wanted to hear something. Sanabria, apparently consenting, went with "Juan" and "Alexander" to the office of security director Valenzuela. Sanabria claims that once there, Valenzuela told them that he neither favored nor opposed the Union, and that if they, the employees, wanted to vote, they should vote "no," presumably referring to the Union. According to Sanabria, Valenzuela further stated that if they were to vote "no," they should let him know and that he would let Guerra know which employees had voted "no" (III:500). Sanabria claims he and the other employees remained silent during the entire discussion.

Valenzuela did not testify. Regarding his employment status with Respondent in October 2000, when he allegedly made the above union-related comments to Sanabria and other employees, Valenzuela, according to Guerra, was at the time an independent contractor retained by Aljoma to manage security at the facility and to oversee the security guards in the Respondent's employ.[18] Pomar testified that as head of security, Valenzuela had authority to call an employee's attention to some safety or security concern, e.g., advising an employee to wear a hardhat, and to generally report safety and/or security infractions to management, but did not have authority to "ad-

[14] Contrary to the General Counsel's intimation on brief (GC Br.:20), I do not view Guerra's testimony about Valenzuela "checking with the guards" as tantamount to directive by Guerra to Valenzuela to "find out about the organization movement."

[15] Barrieras name was misspelled on GC Exh. 4. Thus, GC Exh. 4, at the name listed as No. 2, incorrectly shows Josue Barrieras Vazquez' name as "Josue Barviera Vazquez."

[16] Respondent's counsel, Sala, objected to the questioning of Pagan as to what was said at that meeting on grounds of attorney-client privilege, averring that he too had been in attendance at this meeting in his capacity as legal adviser and that whatever discussions were held at the meeting were therefore covered by said privilege. While I overruled Sala's objection, on further reflection I am persuaded that the discussions held at the meeting were confidential and not subject to disclosure absent a waiver by the Respondent. In this regard, I find no merit in the General Counsel's claim at the hearing that the discussions that took place at the meeting were not confidential because they may have involved possible violations of the Act. See, generally, Patrick Cudahy, Inc., 288 NLRB 968 (1988.) Pagan's testimony as to what may have been discussed at that meeting was therefore not subject to disclosure under the attorney-client privilege and, consequently, has not been relied on here.

[17] While Pagan did not provide Orlando's last name, the employees identified on Respondent's payroll list for the first week of October 2000 (see GC Exh. 32), reflects only one employee with a first name of Orlando, e.g., Orlando Morales. It is reasonable to assume that Morales was the one to whom Pagan was referring. Morales testified at the hearing but was never questioned about Pagan's alleged inquiry.

[18] Guerra explained that Valenzuela had been operating his own security firm with his own guards and that he had contracted with Valenzuela to have the latter provide the guards to handle security at Aljoma, with Valenzuela as head of security. However, because of financial difficulties, Valenzuela proposed to the Respondent, and the latter agreed, that Valenzuela's guards be hired by Aljoma, and that he, Valenzuela, be permitted to continue as director of security under a separate contract. (IV:783.) The record does not make clear precisely when Valenzuela's security guards became employees of Aljoma. Pagan, it should be noted, was asked if, when Colon was discharged, the guards were already Aljoma employees. He replied, "I understand they were employees." His overall testimony regarding Valenzuela's position and duties, however, was anything but clear. For example, asked if he knew what Valenzuela was hired or contracted to do for the company, Pagan answered that he "thinks that the purpose was . . . to recruit security personnel." However, when asked what company Valenzuela was expected to recruit for, Pagan replied, "I wouldn't know." Pagan's testimony in this regard, like his testimony about having taken part in the September 2000 layoffs, is too vague and uncertain to be entitled to any weight and is, likewise, found not to be credible.

monish" employees.[19] The above evidence, particularly Guerra's undisputed testimony which I credit, convinces me that, during the alleged October conversation described by Sanabria, Valenzuela was an independent contractor and not a supervisor under the Act, as claimed by the General Counsel. There is in this regard no evidence to show that Valenzuela, during this October time frame, possessed any of the indicia of supervisory authority described in Section 2(11.) Although named discriminatee Almodovar testified that, prior to being discharged in September 2000, he observed Valenzuela giving instructions to security guards and making his rounds on a company-owned golf cart, those facts alone do not establish Valenzuela as a statutory supervisor.

Alleged discriminatee Vazquez testified that in late 2000, probably around December, Guerra called Vazquez to his office and offered to change Vazquez' job duties, and to make economic changes. According to Vazquez, Guerra also stated he was the only one who could provide Vazquez with a medical plan and who could help him financially. (III:408.) Guerra was never asked about, and consequently did not refute, the statement attributed to him by Vazquez. Accordingly, I credit Vazquez' above testimony. In this regard, Guerra's admission of having engaged in a campaign against the union, and of having met individually with employees to discuss the Union, makes it quite plausible that he would have, during his meeting with Vazquez, made such remarks.

On September 28, the Union petitioned the Board for an election among "all production and maintenance employees, drivers, finger (fork) lift operators, loading employees, mechanics, and laborers" employed by the Respondent at the Ponce facility (GC Exh. 11). Following an election held on January 12, 2001, at which the Union received a majority of the valid votes cast, the Union was certified on January 22, 2001 as the exclusive bargaining representative of the Respondent's employees in an appropriate unit.[20]

Jose Antonio Gonzalez, an admitted Section 2(11) supervisor, testified to being present during a conversation held in November 2000 on Company premises at which supervisors Pagan and Alvarado, and employee Jonathan Gonzalez, were also present. Jose Gonzalez claims that Pagan initiated the conversation by asking Jonathan Gonzalez why he had brought the Union into the Company, and then stated that if the Union won, all employees would be fired. (III: 489.)

Jonathan Gonzalez testified in this proceeding but was not asked about the above November conversation. He did, however, testify to having a conversation with Pagan in January 2001 (presumably before the latter's discharge), during which Pagan told him that because of the employees' decision to go to the Union, the Respondent was going to fire all of its employees and close its doors. (II:300–302; 304.) Pagan did not refute either the November 2000 or the January 2001 statements attributed to him by Jose Gonzalez and Jonathan Gonzalez, respectively. Accordingly, I credit the testimony given by the latter two and find that Pagan in November 2000 and again in January 2001 told Jonathan Gonzalez that employees would be fired if they chose to go Union.

Jonathan Gonzalez also testified, without contradiction, to having a conversation with Guerra in the latter's office sometime in January 2001 prior to the Board's election. He claims that Guerra summoned him to his office and, once there, told Jonathan Gonzalez that he knew what was going to happen in the upcoming election, and advised Jonathan Gonzalez to "think about his family" and that no one would be able to help him keep his job. Guerra purportedly further made reference to the September 2000, layoffs, stating that contrary to what he and other employees believed, the individuals discharged in September, including Colon, would not be returning to Aljoma. Finally, Jonathan Gonzalez claims that Guerra also mentioned during this conversation that if he and other employees needed a medical plan, they should discuss it with him and he would be responsive to their needs. (II:300–302; 326.) His testimony is credited as Guerra, who testified at the hearing on other matters, was never questioned about, and consequently did not refute, the above statements attributed to him by Jonathan Gonzalez.

Another employee, Jose Rodriguez, testified that he too was called by Guerra into his office in January 2001 but prior to the election, and reminded that his (Rodriguez') son also worked for Aljoma. Rodriguez also initially testified that Guerra then told him not to count on the six employees who were laid off in September 2000 returning to work for Aljoma. When asked by the General Counsel if Guerra had mentioned the Union during that conversation, Rodriguez, despite some prompting by the General Counsel, had no such independent recollection. Hoping to jog his memory as to what else Guerra may have said, the General Counsel showed Rodriguez an affidavit he had previously given to the Board reflecting that Rodriguez had therein indicated that Guerra had made some reference to the Union during that conversation. Yet, when asked if the affidavit had refreshed his recollection as to what else Guerra might have stated, Rodriguez essentially repeated his earlier description of the conversation, e.g., that he was told by Guerra that those employees who had been laid off would not be returning to

[19] While initially stating that Valenzuela "could recommend disciplinary action against [an] employee," Pomar subsequently clarified his testimony by suggesting that while he, Pomar, might take disciplinary action against an employee to whom Valenzuela had spoken on numerous occasions about safety or security violations, such action was taken on his own initiative and, inferentially, not because of any such recommendation from Valenzuela. (V:17; 39–40.) When viewed in its entirety, Pomar's testimony does not, in my view, reflect that Valenzuela "could make recommendations to take disciplinary actions against an employee for breaching security rules of the company," as the General Counsel asserts on brief. (GC Br.:54.)

[20] The "Certification of Representative" received into evidence as GC Exh. 13 is erroneously dated January 22, 2000, rather than 2001. The description of the certified unit differs slightly from that contained in the initial representation petition. Thus, the certified unit includes:

> "All fingerlift operators and laborers, including treatment plant fingerlift operators and laborers, yard janitorial employees, equip.m.ent maintenance employees, and laborers employed by the Employer at its facility located in Ponce, Puerto Rico; but excluding merchandisers, electricians, wood treatment plant operator, all administrative personnel, clerical employees, secretaries, managerial employees, office janitorial employees, messengers, guards, and supervisors as defined in the Act."

work (III:473–474). Dissatisfied with Rodriguez' inability to reconcile his testimony at the hearing with the statements contained in his affidavit, the General Counsel then read into the record the relevant portion of Rodriguez' affidavit, wherein Rodriguez, unlike his testimony at the hearing, stated that during his meeting with Guerra, the latter stated, "That the people he suspended, the day after finding out that the union could be there, and he did not want them, and especially [Bernardo Colon]." Asked if he recalled making the above statement to the Board agent who took the affidavit, and whether this, in fact, was what Guerra said to him during their conversation, Rodriguez replied, "Yes." (III:475.)

Rodriguez' claim of having had a conversation with Guerra, during which the latter stated that the six employees discharged in September 2000, would not be rehired, was not disputed by Guerra. Thus, I have no difficulty crediting Rodriguez' testimony in this regard. I am, however, somewhat skeptical of his further testimony, elicited by the General Counsel via his affidavit, that Guerra, during their conversation, also stated that he had discharged the six employees in September 2000, after learning of the Union. Rodriguez, as noted, made no mention of this additional comment by Guerra in his initial description of the conversation and, surprisingly, failed to mention this alleged reference by Guerra to the Union even after the General Counsel sought to refresh his recollection by showing and allowing him to read the portion of his affidavit corresponding to that conversation. Although he eventually relented, albeit not without some prodding from the General Counsel, and accepted the version of the conversation in his affidavit as accurate, from my observation of his demeanor I was not convinced that Rodriguez himself honestly believed that the contents of his affidavit accurately reflected what Guerra may have said to him. Accordingly, I accept Rodriguez' initial version of his testimony and find that Guerra stated only that the six employees who were laid off in September 2000, would not be returning to Aljoma, and made no reference to the Union during said conversation.

Vazquez testified that following the Board election, his duties were changed from that of a mechanic to doing packaging and rebar cleaning work. He claims that the change was made by Valenzuela on instructions from Guerra. Thus, he testified that when he asked Valenzuela why his duties had been changed, Valenzuela replied, "Well, these are orders that I received from the office of Mr. Guerra." Valenzuela purportedly then told him that the reason for the change "was because of our decision for the Union." (III:409–410.) As Valenzuela was not called to refute Vazquez' above claim, I credit Vazquez' above claim as to what Valenzuela said to him.

3. The change in employee work hours

The record reflects that prior to the Union's January 22, 2001 certification, some unit employees worked a 7 a.m.–4 p.m., shift, while others, primarily those unit employees in the shipping department, worked an 8 a.m. to 5 p.m. shift. Employees working the latter shift, according to Pomar, were the ones who would typically handle any late orders placed by Home Depot. Pomar explained that orders from Home Depot generally arrived either in the morning or late in the afternoon, and that employees working the 8 a.m. to 5 p.m. shift were responsible for completing the Home Depot ship.m.ent, and often had to work overtime to finish the work. On or about February 6, 2001, Pomar unilaterally changed the second shift start and finish times from 8 a.m.–5 p.m. to 9 a.m.–6 p.m., explaining that he did so because he was having difficulty getting employees to do the overtime work needed to fill the Home Depot orders. Pomar sent Figueroa a letter dated February 6, 2001, advising him of the change in the unit employees' work hours and the reason therefore (GC Exh. 6 [b]). Figueroa admits that the following day, February 7, he and Pomar discussed the problem the Respondent was having getting employees to work overtime and the fact that this problem had necessitated the change in the work shift hours (I:80). By letter dated February 8, Figueroa advised Pomar that the change in employee work hours had been done without prior notification to, or bargaining with, the Union, and that the Respondent was not free to change employee conditions of employment without first bargaining with the Union. Figueroa demanded that Pomar reinstate the original 8 a.m.–5 p.m. schedule, and to sit down with the Union "to discuss the employment conditions and the schedules of the workers."

Although unable to recall if Pomar responded to his February 8, 2001 letter requesting negotiations, the record reflects, and Figueroa subsequently admitted, that the Respondent, through attorney Sala, did respond by letter also dated February 8, 2001, wherein he proposed that the parties meet on February 14, at the Labor Department's Employment Security Bureau. Regarding the shift change made by Pomar, Attorney Sala informed Figueroa that the shift change had been rescinded, thereby clarifying any misunderstanding that may have occurred (GC Exh. 10[b]). Despite Attorney Sala's characterization of the shift change as a mere misunderstanding that had been rectified, Pomar testified that he reverted to the original 8 a.m.–5 p.m. shift only after meeting with employees and obtaining assurances that they would work overtime, if needed. (V:24–26.)

The above facts make patently clear, and I find, that the Respondent on or about February 6, 2001, unilaterally changed its employees work hours from 8 a.m.–5 p.m. to 9 a.m.–6 p.m., and that it did so unilaterally without first notifying or consulting with the Union. The Respondent's assertion to the contrary in affirmative defense No.18 of its answer is therefore rejected as without merit.

4. The negotiations and alleged establishment of a grievance procedure

By mid-March, the Respondent and the Union were engaged in contract negotiations I:82–83).[21] The Union's bargaining committee included Colon, and employees Vega and Juan Vazquez. The Respondent was represented by Pomar and Sala. At one of the parties' bargaining sessions, the reinstatement of the six individuals laid off on September 27, was a topic of

[21] The record does not make clear when the parties in fact began their negotiations. However, a March 13, letter from Figueroa to Respondent's Attorney Sala, referencing a prior "meeting at the bargaining table," makes clear that the parties had been engaged in negotiations prior to March 13.

discussion, although the precise nature of those discussions is not fully clear. Thus, Figueroa testified that at this session, the Union complained that the Respondent had temporary employees working for it while union workers had been laid off, and asked that the laid off workers be reinstated. Figueroa claims that the Respondent agreed to do so but only on a temporary basis (I:114).

In a March 13, 2001 letter to Respondent, the Union complained that Pomar had refused to meet with Figueroa to discuss warning letters which had been issued to one employee, and the employment status of another employee. In a March 15 reply letter, the Respondent notified the Union that it was willing to hire the laid off employees but only on a temporary, part-time basis to clean "rod ends" and repackage certain merchandise, and that once the work was completed, it did not foresee needing the workers any longer. It further explained that Padilla and Maldonado were unwilling to accept temporary, part-time employment because they were already working at full-time jobs, and that Valentin was unable to work due to a medical disability. As to Padilla, the Respondent noted that it did not foresee Padilla being recalled to work in the future. The Respondent in its letter also defended the warnings that had been issued to unit employee, Juan Vazquez, on March 12, 2001, stating that said warnings were issued not for discriminatory reasons, but because of Vazquez' misconduct in carrying passengers on a forklifts, and mocking a supervisor. (See, GC Exhs. 23 and 24.)

Finally, in response to the Union's complaint about Pomar's refusal to meet with Figueroa to discuss certain grievances, the Respondent in its March 15 letter notified the Union that any matter Colon wished to discuss with Pomar would first have to be taken up either with the yard manager or dispatcher manager, and that if Colon still insisted on speaking with Pomar, he would have to make his request known to the yard or dispatch manager who would, in turn, notify Pomar of Colon's request. (GC Exh. 8.)[22] On brief, the Respondent explains that it instituted this procedure because Colon had sought to " impose his will" on it by insisting on being allowed to speak directly with Pomar.

By letter dated March 20, 2001, the Union expressed its disapproval of the various points made by the Respondent in its March 15 letter. Thus, the Union advised the Respondent that it could not hire temporary workers to perform bargaining unit work, and that the Respondent was required to replace its temporary workers with those who had been laid off for participating in the Union's organization drive. It also advised that the Respondent was wrong in suggesting that Padilla could not be recalled in the future because Padilla, like Maldonado and the others who were laid off in September 2000, were unlawfully discharged for union-related reasons. The Union further claimed that the disciplinary warnings issued to an employee for misuse of Company property, e.g., carrying a passenger on a forklift, was, in its view, motivated by antiunion reasons. Finally, the letter informed the Respondent of the Union's disagreement with the procedure established by the Respondent for the handling of grievances and other union-related issues, stating that the Respondent could not unilaterally establish such a procedure. (GC Exh. 9[b].)

On March 20 the Respondent sent the Union another letter apparently in response to the Union's letter of the same date. The Respondent's letter confirmed a series of conversations the parties had had during the prior 2 days, and addressed Figueroa's earlier request to speak with Pomar. As to the latter, the Respondent in its letter stated its "willingness to meet with [Figueroa] as union officer at any moment after 5 p.m. and in a place of mutual agreement outside company premises." As to matters of urgency, the Respondent stated that Colon, as union steward, could "go to the respective supervisors and even Mr. Pomar within company premises, but pointed out that Pomar would be "available to discuss matters with Mr. Colon within company premises" after Pomar's normal work hours, e.g., after 5 p.m. (R. Exh. 2.)[23]

The Union, by letter dated March 23, responded that the Respondent's refusal to meet with Figueroa on its premises was discriminatory. It also expressed disapproval of the Respondent's insistence that any meeting with Pomar could only be done after working hours, explaining that Colon had a right, as union steward, to discuss union-related issues and employee problems during normal working hours as these matters were related to the Respondent's business functions. The Union further noted in its letter that while such matters could, if the parties agreed, be discussed outside working hours, the Respondent could not unilaterally restrict the Union's right to discuss union-related matters during normal working hours. (R. Exh. 3.)

5. The "guard dog" incident

Cruz worked for Respondent from April 1, 1996, until discharged on October 28, 2000. He testified that while he was hired as a messenger in the office, a few days after his hire he began performing additional duties such as forklift driver, chauffeur, and packaging lumber. He further testified that when directed to do so, he would at times take the Company guard dog to the vet. However, Cruz claimed, without contradiction, that some 4 months prior to being discharged, he was reassigned from doing office work to the packaging area. Cruz, as noted, signed a Union authorization card on September 20, and was named in GC Exh. 4, the October 3 letter sent by the Union to Guerra identifying the Union's supporters, as one of the Union's leaders.

[22] In stating on brief that the procedure described in its March 15letter was one "that Colon could follow to discuss grievances," the Respondent appears to suggest that Colon was not obligated to follow said procedure and was free to "approach the respective supervisors and even Mr. Pomar." (R. Br. 33, 34.) However, the very wording in the March 15 letter stating that the procedure was one "that Mr. Colon must follow," undermines the Respondent's above claim, and reflects that the union steward indeed was required to follow this procedure when presenting grievances and other matters to the Respondent.

[23] The Respondent's March 23, letter appears to have modified the grievance procedure set forth by the Respondent in its March 15letter, for while the grievance procedure, as initially described in the March 15letter, contained no time restriction on when the union steward could meet with Pomar, the procedure, as subsequently reiterated by the Respondent in its March 23, letter, limited Colon's right to meet and discuss matters with Pomar to the latter's after-work hours.

Cruz claims that on October 28, he went to the Respondent's office and was told by Guerra's secretary, Gisela de Leon, that Guerra wanted him to take the Company guard dog to the veterinarian. Cruz told de Leon that he would not do so as he no longer worked in the office. Cruz testified that a short while later, Guerra approached him in the packaging area and told him that because Cruz "belonged to the Union," he would have to take the dog to the vet. Cruz again declined to do so stating that he no longer worked in the office. Guerra, according to Cruz, instructed him to go the office. Once there, Guerra directed Pomar to issue Cruz a warning. Presumably after the warning was prepared and handed to Cruz for signature, the latter refused to sign without first reading the warning. Guerra then purportedly told Cruz he did not have to read anything, and immediately thereafter discharged Cruz and directed him to clock out. According to Cruz, both Pomar and Pagan were present at this meeting. (II:252.)

Guerra's version is that when he arrived at work on October 28, he spoke with Pomar who told him that Cruz was refusing to take the dog to the vet.[24] Guerra, accompanied by Pomar, sought out Cruz and found him talking to other employees. Guerra then called Cruz aside and said to him, "Noel, please take the dog to the vet." When Cruz refused, Guerra asked why he would not do so, and Cruz again responded that he was not taking the dog to the vet. Guerra then asked Cruz to accompany him to the office, and once there, Guerra renewed his request for Cruz to take the dog to the vet, and Cruz, in a loud voice according to Guerra, again refused. Guerra claims that he repeated his request one more time and, when Cruz refused to carry out his instruction, directed Pomar to give him a warning. On hearing this, Cruz stated that he would not sign any warning, again refused Guerra's request that he take the dog to the vet, and commented that the "abuse" in the company was going to end. Guerra then directed Pomar to issue Cruz a second warning for being disrespectful, to which Cruz responded, in an angry tone, that he would not sign the second warning either, that this was not going to end here, and that Guerra could fire him if he wanted to. Guerra at that point directed Cruz to clock out and leave the premises. The record does not make clear if a discharge notice was ever prepared or issued to Cruz, for no such notice was produced at the hearing.[25] Nor, for that matter, was the warning issued to Cruz prior to his discharge produced.[26]

Guerra agrees that both Pomar and Pagan were present during this meeting. However, while Pomar and Pagan testified at length on other matters, neither was questioned about this particular meeting, or asked to confirm or deny either Guerra's or Cruz' version of events.

Guerra testified that employees had been discharged in the past for refusing to do their work, and that he had not, as he had done in Cruz' case, given other employees several opportunities to carry out his instructions. (IV:754–756.) Guerra admitted that Cruz was never specifically told that taking care of the dog was part of his assigned duties. However, a document admittedly signed by Cruz on "8/28/96" reflects that in addition to being "in charge of the office's maintenance" and assisting in the tasks performed by the merchandise dispatch department, Cruz' functions included being available to perform "any other assigned task which may be required of him." (R. Exh. 6.)[27]

Maldonado testified that he had been taking care of the Company's guard dog since it was born, that Guerra assigned this duty to him, and that Cruz, as well as Colon, also shared that responsibility. Although not questioned about Maldonado's assertion regarding his alleged responsibility for the dog's care, Colon nevertheless did admit to having taken the dog to the vet on one occasion (I:158). He testified, however, that on one occasion during Christmas of 1999, he refused Pagan's directive to take care of the guard dog and was never disciplined for doing so (I:152). Maldonado recalls having taking the dog to the vet on some five or six different occasions, but that, on one other occasion in early 2000, when the dog was about to give birth, he refused Pomar's request to take the dog to the vet and was never warned or disciplined for his refusal. (II:288.) I credit Maldonado and find that the occasional care of the guard dog, including visits to the vet, had been entrusted to Maldonado, as well as to Cruz and Colon. I further believe, given Maldonado's and Colon's undisputed testimony, that no employee had ever previously been warned or discharged for refusing to take the guard dog to the vet or to care for the dog.

6. The forklift incident

Vega began working for Respondent in 1995 as a repackager, and eventually was licensed as, and became, a forklift operator. He testified that on becoming a forklift operator he was made aware of a company safety rule prohibiting forklift operators from carrying passengers on the vehicle. (II:367.) He claims that notwithstanding the prohibition, he often carried passengers on his forklift in plain view of, and without receiving complaints or warnings from, supervisors. He explained that he did so because oftentimes he and another employee were assigned to pick up lumber at a nearby pier and that the other employee rode along on the forklift to help him with the assignment.

Vega, as noted, signed an authorization card on September 20, 2000. He testified that sometime in November 2000, he was in one of the company restrooms when Valenzuela approached and, on seeing that the restroom was clean, told Vega that "perhaps that's what I enjoyed, that he had paid $10,000 to his attorneys," and that if employees had not engaged in union activity, that money would have gone to them. He also testified to having overheard Pagan tell employee Jonathan Gonzalez sometime between November 2000 and January 2001, that because employees had decided on a union, "we were going to

[24] Pomar was not questioned about this incident or about Cruz' subsequent warning and discharge.

[25] The Respondent apparently prepares and maintains written documentation of employee terminations, leading me to believe that the Respondent would have prepared a termination notice for Cruz (see R. Exh. 18–19.) No explanation, however, was proffered for why Cruz' termination letter was not produced.

[26] Unlike Guerra, Cruz makes no mention in his testimony of having been issued a second warning for refusing to sign the first.

[27] The Respondent apparently did not maintain job descriptions for any other of its employees.

be fired," and that employees should ask Colon for a job (II:343; 344). Vega purportedly took part in the contract negotiations between the parties.

Vazquez started working for Respondent in September 2000 as a mechanic. He testified that he initially did not support the Union because he felt he was being treated well by the Respondent. Vazquez claims that he and Guerra often discussed the union, explaining that he did so because Guerra knew he did not favor the union. During one such conversation that purportedly took place sometime prior to the Board election, Guerra, Vazquez claims, offered him economic improvements and a job change, and told him he, Guerra, was the only one who could provide him with a medical benefits plan and who could improve his financial condition. Vazquez testified that following the election, Valenzuela, on instructions from Guerra, changed his job duties from mechanic to doing repackaging and rebar work, and cleaning up trash. When he asked Valenzuela why his job duties had been changed, Valenzuela stated that he was simply following orders he had received from Guerra's office, and that changes were caused by the employees' decision to bring in the Union. (III:410–411) He claims he became a union supporter after this.

On March 12, 2001, Vega and Vazquez each received from supervisor Alvarado two disciplinary warnings for conduct arising from the use of a forklift.[28] Alvarado testified that around 9 a.m. that morning, he stopped a forklift being driven by Vazquez because the latter was carrying two passengers, Vega and employee Rivera, contrary to company rules. According to Alvarado, when stopped, both Vega and Rivera stepped off the forklift after he asked them to do so. Vega, however, then became upset, remarked, "To hell with it, I'm not going to walk to breakfast, I'm going to go," and hopped back on the forklift. After smiling at Alvarado, in what Alvarado perceived to be a mocking gesture, the three continued on their way. (IV:601.) Alvarado claims he then reported the incident to Pomar, and after the two discussed the incident, Pomar prepared the warnings. After being signed by Alvarado, the warnings were given to Valenzuela for issuance to Vega and Vazquez. Alvarado admits that he has, in the past, observed employees riding as passengers on forklifts and that, while he has orally warned employees against such conduct, he has never actually issued any written warnings for such behavior. He explained, however, that the distinction between those prior instances and the March 12 incident is that, in the prior instances, employees caught traveling as passengers on forklifts complied with his instructions to get off, whereas, in the March 12 incident Vega and Rivera refused to do so and, with Vazquez driving, continued to flout his instructions. (IV:625–627.)

Vega's version is that when stopped by Alvarado on March 12 he was driving the forklift, and that Vazquez was the passenger. He denies having had any other passengers on the forklift at the time. According to Vega, after being stopped, Alvarado asked him what Vazquez was doing on the forklift, and he responded they were on their way to breakfast. Vega claims that when Alvarado asked Vazquez to get off, the latter complied, and that he (Vega) then continued on his way. Vega denies that Vazquez or anyone else told Alvarado "to hell with it" and jumped back on the forklift, and denies smiling or laughing at Alvarado during this incident. He admits having had knowledge, since 1999, of the existence of a Company rule prohibiting forklift operators from carrying passengers on the vehicle. (II:367–368.) He insisted, however, that employees often rode as passengers on forklifts and were never issued warnings. Vega claims that both warnings were read to him aloud by Alvarado.

Vazquez provided a wholly different version of the events leading up to the March 12 warnings issued to him. He testified that on March 12 there were two separate incidents involving forklifts. He claims that in the first incident, he was the passenger on a forklift being driven by Vega on the morning of March 12 that Alvarado stopped the forklift and instructed him to get off, and that he did so. The second incident, according to Vazquez, occurred around noontime on March 12. During this latter incident, Vazquez purportedly drove the forklift and was carrying Rivera as a passenger when he was stopped by Alvarado. Once stopped by Alvarado, Vazquez purportedly instructed Rivera to step down and then smiled at Alvarado. Vazquez denies that his smile was intended to mock Alvarado. Rather, he explained that he smiled because Alvarado's decision to stop him caused him to recall that Valenzuela had earlier remarked to him that he, Valenzuela, did not understand why Vazquez was receiving so many warnings. (III:418; 453.)[29] Vazquez received two warnings that day. He claims that the first one, GC Exh. 23, pertained to the morning incident in which he was riding as a passenger on a forklift driven Vega, and that the second warning, GC Exh. 24, allegedly issued for mocking Alvarado, pertained to the noontime incident during which he was driving a forklift and carrying Rivera as a passenger. (III:454.)

Vazquez testified that he did not believe anything was going to happen following the second forklift incident until he was handed the second warning by Valenzuela. He claims that on receiving the warning, he phoned Alvarado and asked why he was issued the warning since he had instructed Rivera to step down. Alvarado purportedly responded that he had not wanted to give Vazquez the warning but had been threatened with discharge if he did not do so. Alvarado, he claims, refused to disclose to Vazquez who had threatened him (Alvarado) with discharge. (III:415)

[28] Alvarado testified that a third employee, Jon Carlos Rivera, also received a warning based on the same incident.

[29] Vazquez' claim that his smile was prompted by something Valenzuela said to him earlier about Vasquez receiving too many warnings does not square with his further testimony that Valenzuela made his remark about 30 minutes to 1 hour after Vasquez received his second warning. Thus, if, as claimed by Vasquez, Valenzuela made his comment after Vasquez received his second warning, then it is highly unlikely that Vasquez could have been thinking of what Valenzuela purportedly said to him when he smiled at Alvarado for, by Vazquez' own account, Valenzuela had not yet made his "numerous warnings" remark to him. (III:421.) While Vazquez' testimony in this regard was not disputed, I am nevertheless convinced, given the inherent inconsistency in his testimony, that Vazquez' claim as to what Valenzuela may have told him was a fabrication.

I found neither Vega's nor Vazquez' version of events surrounding the March 12 warnings to be particularly convincing, and consequently reject their claims as to what occurred that day as not credible. Rather, I accept Alvarado's version as true and find that the two warnings issued to Vega and Vazquez arose from a single incident, and not from two separate incidents as claimed by Vazquez, and that, contrary to Vega, and as testified to by Alvarado, Vazquez was driving the forklift while Vega and Rivera rode as passengers.

7. The name-calling incident

On March 15, 2001, an incident occurred at Respondent's facility involving employee Orlando Morales which led to a warning being issued to Barrieras, and warnings and suspensions being issued to Vega and Vazquez. Vega was subsequently discharged allegedly for conduct stemming from this incident. Morales testified that on that day, he was on a forklift getting some lumber out of the treatment plant and was on his way past the mechanic shop when he came across Barrieras, Vazquez, and Vega. All three, he claims, and Vega more so than the others, began shouting "toad" or "frog" at him. He then stepped off the forklift and complained to Colon, who was in the vicinity, about the name-calling. Colon, he claims, told him not to worry, that it was no big deal. Morales, however, remained indignant that the three individuals had been disrespectful to him. Valenzuela, who, according to Morales, had his office nearby and heard the commotion, came out and asked Morales what was going on. Morales explained that Barrieras, Vazquez and Vega had been yelling "toad" at him. Morales claims that Valenzuela then led him into his office and asked what he wished to have done about the name-calling, stating that Barrieras, Vazquez, and Vega could be suspended for calling him "toad" as it showed a lack of respect and reflected a lack of discipline. Morales purportedly responded that any such suspension decision had to be made by Company managers, but that similar incidents of name-calling had occurred in the past which he viewed as disrespectful.

The following day, March 16, Morales was injured on the job. While in Pomar's office to report the injury, Morales told Pomar about the name-calling he had been subjected to by Barrieras, Vazquez, and Vega the previous day, and complained that this had been an ongoing problem. Pomar testified that on receiving the information from Morales about the name-calling incident, he discussed the matter with Valenzuela who, according to Pomar, witnessed the incident first-hand and was, therefore, able to corroborate Morales' claim. As Valenzuela did not testify, Pomar's claim that Valenzuela witnessed the incident is uncorroborated. In fact, Morales own testimony, that when the incident occurred Valenzuela left his office after hearing a commotion to inquire about what was going on, strongly suggests that Valenzuela did not personally witness the incident. Based on his discussions with Morales and Valenzuela, Pomar issued disciplinary warnings to Barrieras, Vazquez, and Vega, and further suspended Vazquez and Vega, but not Barrieras, for 3 and 4 days respectively for their involvement in the incident. (See GC Exh. 21 and 25.) The warnings were purportedly written by Pomar but signed by Valenzuela.

Barrieras testified as follows regarding the above incident. On March 15, 2001, he was in the mechanics shop working with another employee, whom he identified only as "the Barby," when he heard other employees yelling "toad!" at Morales who was moving merchandise from one location to another. Morales apparently reported the incident to management the following day, March 16. Barrieras testified that later, on the day of the incident, went he went to punch his timecard, he was called to Valenzuela's office where he found Valenzuela holding his timecard. Valenzuela then told Barrieras that Morales had complained that he and other employees had been calling him "toad" and that, consequently, Barrieras was being suspended. Barrieras responded that if he indeed had called Morales a "toad," that Valenzuela should bring Morales to him and he, Barrieras, would clear up the matter by apologizing to Morales. Valenzuela told him that this was a positive step, and suggested that Barrieras speak with managers Irizarry and Altori to see if they could persuade Pomar to give him a second chance. Barrieras did so and, a day or so later, was called to Pomar's office. After explaining to Pomar what had happened, Pomar gave him a written warning and stated he would give Barrieras another chance and not suspend him if he signed the warning, which Barrieras did. (III:577–579.) The warning, dated March 19, and containing Alvarado's, not Pomar's, signature, states that Barrieras had been disrespectful to Morales on March 15 by calling him "TOAD," and that "these attitudes are not permitted at Aljoma Lumber." (GC Exh. 30[b].) Barrieras admitted being present during the incident but could not recall what prompted it. He explained, however, that employees often addressed each other as "toad" or "apple-polisher," a reference to someone who cozies up to management. Further, while admitting to having used the term "toad" that day, Barrieras denies having directed himself at Morales. (III:584–585.)

Vazquez admits receiving a warning and being suspended over the "toad" incident. The warning, received into evidence as GC Exh. 25[b], states that Vazquez had been "disrespectful" to Morales by calling him "toad" and had verbally threatened Morales. It further states that Vazquez had previously been verbally warned for "a similar situation." The warning notifies Vazquez that he was being suspended from employment from March 16, 2001, to March 22, 2001, for the incident.

Vazquez testified that on the day of the incident, the words "toad" and "apple-polisher" were being bandied about in a loud manner by various employees at the facility, and that, when Morales arrived at the facility, the latter complained that the comments were being directed at him. According to Vazquez, he and other employees told Morales they were not calling him "toad" but were, instead, calling each other "toad." Vazquez claims that employees often called each other "toad," and that he himself had often been so addressed in the presence of supervisors Alvarado and Valenzuela, and that no action was ever taken against the individuals. In the hope of clearing up any misunderstanding, Colon, he claims, went to see Valenzuela and left the latter's office believing the matter had been resolved. Soon thereafter, however, Vazquez was called to Valenzuela's office, told that Morales had complained that he and Vega had been disrespectful to Morales, and given the

warning. The warning states that Vazquez had been "disrespectful" to Morales by calling him "TOAD" and threatening him, and that Vazquez had previously been "advised verbally" by Valenzuela "for a similar situation." (GC Exh. 25[b].)

Vega, like Vazquez, testified that name-calling among employees was a common occurrence at the facility, that employees, including himself, were often referred to as "toad" or "frog," and that one of the Company's dogs was, in fact, named "toad."[30] Vega claims that, to his knowledge, no employee ever complained about being called a "toad." On March 19, however, Vega was called to Valenzuela's office and told that Morales had complained about being called a "toad" by Vega and others.[31] He claims that Colon, who was present at this meeting, denied to Valenzuela that employees called Morales a "toad," and told Valenzuela that employees had simply been calling out to the dog named "toad." (II:353.)[32]] Vega denied calling Morales a "toad." Valenzuela nevertheless gave Vega a written warning and a 4-day suspension (to September 23) for the incident (GC Exh. 21).[33] The warning states that Vega was "disrespectful" to Morales by calling him "FROG," and that Vega had previously been warned by Valenzuela for a "similar situation." (GC Exh. 21[b].)

Pomar's testimony regarding the March 16 warnings is that Morales, accompanied by Valenzuela, visited his office on March 16, and complained about being called "toad" by Vega and Vazquez the day before. According to Pomar, Morales complained that Vega had been disrespectful to him on other occasions prior to the incident in question. Pomar, however, did not mention receiving a similar complaint from Morales about Vazquez being disrespectful to him in the past. Pomar admits he never questioned Vega or Vazquez about the incident, or conducted any investigation into the matter. Rather, he testified that he simply took Valenzuela's word of what occurred because the latter presumably had personally witnessed the incident (V:35).

8. Vega's March 23 discharge

The record reflects that soon after receiving the warning and suspension for the March 15 name-calling incident, Vega was discharged by Pomar allegedly for threatening Morales. While the evidence and in particular the discharge letter itself, indicates, and the Respondent on brief concedes, that Vega's discharge occurred on March 23, Pomar's testimony, as more fully discussed below, suggests that the discharge decision was made on March 19.[34] Morales and Vega both testified about the events surrounding the discharge but gave very different accounts.

Morales' version is that following the March 15 name-calling incident, he received an injury on the job and was out for several days. He testified that as he was returning to Respondent's facility following the brief absence to hand in some workman's compensation forms, he encountered Vega who, according to Morales, had just received his warning and suspension notice. As Vega received his warning and suspension for the March 15 incident on March 19, Morales' encounter, according to his testimony, would have occurred on March 19. Morales claims that during this meeting with Vega, the latter, in a threatening manner, blamed Vega for his suspension. Morales replied that he had no idea what Vega was talking about as he, Morales, had been out for several days on medical leave. Morales testified that following this encounter with Vega, he went into the facility, delivered the workman's compensation forms, and, presumably fearing he might again encounter Vega, asked Valenzuela to escort him out to his car, where his wife and children were waiting. He claims that when he got to his car, Vega was waiting for him. Vega, according to Morales, came up to him and, in what Morales perceived to be a threatening manner, stated that they should "fix this problem here and now, you and I, man-to-man." Morales told Vega to leave him alone because he did not want any problems, and drove away. (IV:639.) Morales' testimony, thus, makes clear that he

[30] Morales himself testified that employees "always" called him "toad" (IV:636.)

[31] Vega received his warning on March 19 as he apparently was not at work on March 16.

[32] Colon was not questioned about this incident.

[33] Pomar at the hearing stated that he prepared and gave the warning to Vega (V:41.)

[34] As will be shown infra, Vega's testimony suggests that his discharge occurred several days after March 23. His testimony, however, is at odds with Pomar's claim that the discharge decision was made on March 19 and with Respondent's claim on brief that the discharge occurred on March 23 (R. Br. 48). As to Pomar's testimony, it is quite possible that Pomar made his decision to discharge Vega on March 19, but decided to wait until Vega completed his suspension on March 23 to implement it. This would, of course, explain why the discharge notice contains a March 23 date. Still, I find this to be a highly unlikely scenario for no such claim was made by Pomar at the hearing, and Pomar did not strike me as someone who would react in such a manner. Pomar, it should be noted, never testified as to when the discharge decision was carried out. However, the abrupt manner in which Pomar responded to the March 15 alleged name-calling incident, e.g., by immediately issuing warnings and suspensions without investigation or hearing all sides, convinces me that had the decision to discharge Vega been made on March 19, it would have been immediately carried out notwithstanding that Vega was still under suspension. In any event, Pomar's own shaky testimony as to when he prepared the discharge notice renders his account suspect. Thus, Pomar initially testified that he prepared the discharge notice (presumably having already decided to discharge Vega) soon after Vega received his March 19 warning and suspension for the March 15 name-calling incident, and after Valenzuela, that same morning, reported to him that Vega had threatened Morales as the latter was leaving the facility. However, he subsequently changed his testimony to reflect that what he had prepared that morning (March 19) was not the discharge letter, but rather the suspension notice (V:32). Yet, further on in his testimony, Pomar admitted he could not recall if the discharge letter was prepared on March 19 (42–43). In short, Pomar's testimony regarding the timing of his discharge decision is, at best, vague, and, in my view, not credible. I also believe that Vega was mistaken when he testified that he was discharged a few days after completing his suspension on March 23. Rather, I find it more likely than not that the decision to discharge Vega was made and carried out on March 23, and not, as claimed by Pomar, on March 19. The March 23 date on Vega's discharge notice, the wording therein stating that the discharge was "effective today, March 23, 2001," and the Respondent's own assertion on brief that the discharge occurred on March 23, convincingly establishes that the decision and implementation of Vega's discharge occurred on March 23.

did not go back to Pomar to report this latter incident with Vega but simply drove away.

Pomar testified that on the same morning he gave Vega the warning and suspension for the March 16, name-calling incident, e.g., March 19, Morales stopped by his office and complained that Vega had threatened him earlier that morning, a claim that, incidentally, is not found anywhere in Morales' testimony. According to Pomar, after lodging his complaint, Morales asked Valenzuela to escort him out of the facility to his car, and that Valenzuela did so (IV:829–830). A short while later, according to Pomar, Valenzuela returned and reported that Vega had again threatened Morales before the latter drove away. Pomar testified that based on Valenzuela's report, he prepared a warning notice and a discharge letter for Vega.[35] Pomar's testimony thus reflects that his decision to discharge Vega was not based on any report of complaints he may have directly received from Morales, but rather on what Valenzuela purportedly reported to him after Valenzuela returned from escorting Morales out to his car.[36] As Valenzuela did not testify, it is unclear just what he may have told Pomar about what had occurred between Morales and Vega which caused Pomar to terminate Vega. Pomar's own version of events makes clear that he never bothered to confirm the accuracy of Valenzuela's report of the incident with Morales, nor did he investigate the matter or question Vega about the alleged incident before deciding to fire him.[37]

Vega's account is as follows. On receiving his warning and suspension on March 19, for the March 15 name-calling incident, he left the premises. Contrary to Morales, however, Vega denies encountering the latter on his way out. He claims instead that after completing his suspension on March 23, he returned to work but sustained a foot injury 2 or 3 days later. According to Vega, after visiting the Workman's Compensation office, he returned to Respondent's facility but was prevented from entering by a security guard who handed him a letter that turned out to be the discharge notice. The discharge letter, as noted, stated only that Vega was being terminated "effective today, March 23, 2001," but gave no reason for the termination. On reading it, Vega requested and received permission to enter the facility to speak with Valenzuela. During this meeting Valenzuela, according to Vega, told him he had been discharged because Morales continued to complain about being called "toad" by Vega. Vega then asked about Morales' whereabouts and was told by Valenzuela that Morales was out due to an injury.

Vega claims that after leaving Valenzuela's office, and as he was about to pass the security guard, he met Morales coming to the facility to drop off some workman's compensation documents. During their meeting, Vega told Morales that he had been discharged because of the latter's complaints and showed Morales the discharge letter he had received. Vega claims that Morales denied the accusation and stated that Valenzuela and Pomar simply wanted to get rid of him. Morales purportedly offered to go with Vega to speak with Valenzuela to arrange for a meeting with Pomar. According to Vega, he and Morales then went to Valenzuela's office and from there presumably headed to Pomar's office. Once there, however, only Morales was allowed in to see Pomar. Vega then waited outside and, a short while later, Alvarado came by and Vega asked Alvarado if he (Vega) could meet with Pomar. After asking Vega to wait outside, Alvarado purportedly went into Pomar's office, but came out a short time later and told Vega that Pomar had nothing to say to him.

Vega claims that after leaving the facility, he went outside and waited by the security guardhouse. Morales appeared a short while later, accompanied by Valenzuela, and told Vega

[35] Vega's discharge letter, dated March 23, 2001, and received into evidence as GC Exh. 5(7b), notified Vega that his services as an Aljoma employee were being terminated that day, but gave no reason for the discharge. The disciplinary warning, also dated March 23, 2001, and received into evidence as GC Exh. 22(b), accused Vega of "threatening" Morales on March 19, as the latter was entering Respondent's facility to drop off some workman's compensation forms. The alleged threat, according to the warning, consisted of Vega blaming Morales for his suspension, telling Morales that the matter "was not going to stay like this," and that he (presumably Vega) was going to his (presumably Morales) home "to resolve the problem." The warning cautions Vega that "any other violation or failure to follow the rules will result in a drastic disciplinary action." Although Pomar took credit for preparing the March 23, warning, it should be noted that the warning, unlike the discharge notice, contains Valenzuela's, not Pomar's, signature. Pomar did not explain why he purportedly prepared a written warning for Vega advising against future misconduct when he had already decided to fire him. The record further does not make clear if Vega ever received the March 23, warning.

[36] Pomar's testimony on how he learned of Vega's alleged threat to Morales which presumably led to Vega's discharge is ambiguous. Thus, his testimony on direct examination suggests that the decision to terminate Vega was made after Morales, accompanied by Valenzuela, came to his office and reported Vega's threat to him. (IV:829–830.) On cross-examination, however, he testified that the discharge letter was prepared after Valenzuela reported the threat Vega allegedly made to Morales as the latter was leaving the facility to go home. According to Morales, following Vega's alleged threat, he (Morales) got into his car with his family and drove home. Morales' testimony makes patently clear that he did not return to Pomar's office to lodge another complaint against Vega, rendering Pomar's assertion on cross-examination, that he prepared the discharge notice based on information provided to him by Valenzuela, the more plausible one.

[37] The Respondent, on brief (R. Br. 49), contends that Pomar's decision to fire Vega on March 23, was based on a pattern of harassment and threats directed by Vega at Morales which included the threats allegedly made by Vega on March 19, a visit by Vega to Morales' home several days later, and a phone call made by Vega to Morales' home later that week threatening to "grab" Morales. The Respondent contends that the acts for which Vega was given a warning and discharged on March 23, were memorialized in a report received into evidence as R. Exh. 9, that was prepared by Pomar based on information provided to him by Morales. The Respondent's above contention, however, does not square with Pomar's testimony, for the latter, as noted, testified that his decision to discharge Vega was based on information he received from Valenzuela on March 19, that Vega had threatened Morales as the latter was leaving the facility that morning. Pomar never cited any threatening phone calls received by Vega at his home later that week, or any harassment visits purportedly made by Vega to Morales' home, as reasons for the discharge. As to the report (R. Exh. 9), the Respondent, strangely enough, never questioned Pomar about it despite the fact that it was he who presumably prepared it and which, as the Respondent would have me believe, describes the conduct for which Vega was discharged. I give no weight to R. Exh. 9, as Pomar never claimed to have relied on its contents to discharge Vega.

that Valenzuela recommended that he, Morales, file a claim against Vega, but that Morales declined to do so because he had never had problems with employees before. Morales purportedly told Vega he had already spoken to Pomar and that Vega should try doing the same. Morales, according to Vega, then simply got into his vehicle and left. Vega also departed at that time and went to see Colon, who suggested they call Morales presumably to find out what had occurred in Pomar's office. Vega, however, claims that when they called Morales, the latter told them that he had already spoken with Pomar, and that "he did not want to know anything about that subject, because all of that had happened behind his back." According to Vega, Morales' wife then got on the phone and told Vega that he did not need to call Morales at his home, and hung up at that point. (II:358–359.) Vega denies meeting Morales on the day of his suspension, or blaming him for the suspension. (II:377–378.)

Morales admits receiving a phone call at home from Vega. He testified in this regard that on March 22, several days after his encounter with Vega at the facility, he received calls at his home not just from Vega, but also from Figueroa and Colon. He claims that the phone calls came within 15 minutes of each other, that the first one was from Figueroa, who wanted to know about the incident between him and Vega, that the second call came from Vega, who again proceeded to threaten him, and the third from Colon, who asked him to forget the incident with Vega. Vega denied he threatened Morales during their phone conversation. Morales claims that later that same day, he went and reported the matter to Pomar, and that Pomar, based on the information provided by Morales, prepared the report (R. Exh. 9), detailing the events that had transpired between Morales and Vega since the March 15 name-calling incident.

As between Morales and Vega, I credit the latter and find that he did not threaten Morales during the above-described phone conversation. While I would not describe either Morales or Vega as an ideal witness, as between the two, I found Vega to be more believable notwithstanding the shortcomings in other areas of his testimony.[38] From a demeanor standpoint, Morales struck me as being less candid and more prone to exaggeration in his recitation of events. As to the phone conversation, there is reason, in addition to his overall lack of credibility, for doubting the reliability of Morales' claim that he was threatened by Vega. Thus, the report (R. Exh. 9) prepared by Pomar, based on information provided to him by Morales, makes no mention whatsoever of Vega having threatened Morales during their phone conversation. I find it highly unlikely that Morales would not have mentioned such a threat to Pomar, or that Pomar would omit it from his report, if a threat had been made. In fact, Morales stated that the report reflected what he had testified to at the hearing (IV:652). Morales was obviously wrong in this regard, for not only does the report make no mention of him being telephonically threatened by Vega on March 22, it makes absolutely no reference whatsoever to phone calls having been made to him by Vega or Colon, contrary to Morales' averment at the hearing.[39] Accordingly, Morales' claim, that he was threatened by Vega during their phone conversation, is rejected.

Nor do I believe that Vega ever threatened Morales on March 19, as claimed by the latter. The one individual who could have confirmed whether or not Vega threatened Morales that day was Valenzuela, who, according to Morales, had accompanied him outside the facility and presumably was present when the alleged threat was made. However, Valenzuela, as already stated, was never called to testify. Nor would Pomar have been able to corroborate Morales' claim for, by his own admission, whatever information he received about the incident came from Valenzuela Pomar therefore could not have known if Morales had in fact been threatened by Vega. Vega, as noted, denies not only having threatened Morales but even seeing or speaking to Morales on March 19. Except for Morales, whose credibility, as noted, is somewhat questionable, the only other person who might have been able to refute Vega's denial about speaking with and threatening Morales on March 19, was, again, Valenzuela, the absentee witness. Whether or not Morales and Vega actually met on March 19, is not of critical importance. Rather, the more important question is whether Morales' claim of having been threatened by Vega is believable. Given his general lack of credibility, and in the absence some other corroborative source, I find his claim that he was threatened by Vega on March 19 not to be credible.

9. Vazquez' April 16, 2001 discharge

Vazquez was terminated by Pomar on April 16, 2001 (GC Exh. 5[8b]).[40] Pomar testified that he decided to discharge Vazquez after receiving a report from Valenzuela that employees had complained to Valenzuela that Vazquez had been disrespectful to them and that they no longer wanted to work with him. Asked to identify the complaining employees, Pomar named only one individual, Miguel Santiago, who at the time of the incident was the Respondent's dispatch supervisor. Pomar claims that Santiago asked to be allowed to punch in his timecard in Pomar's office because every time Santiago clocked in at the rear of the Respondent's facility, Vazquez would make comments that he, Santiago, considered as "disrespectful" and "in poor taste." In short, Vazquez, according to Pomar, was

[38] For example, Vega's testimony regarding the forklift incident was, as noted, found not to be credible. My rejection of some, but not all, of Vega's, or for that matter, any other witness' testimony in this matter is not improper, for there is nothing unusual in a trier of fact crediting a portion of a witness' testimony and discrediting other portions. *Baptist Medical Center/Health Midwest*, 338 NLRB 346, 379 fn. 44 (2002); *Boyertown Packaging Corp.*, 303 NLRB 441, 450 (1991.)

[39] There is yet another discrepancy between Morales' testimony and the contents of the report regarding the events of March 22. Morales testified, for example, that in addition to receiving threats on March 22, he was again called "toad." (IV:659.) In R. Exh. 9, however, Morales described how he was called "toad" during the March 15 incident, but makes no mention of having been called "toad" either on March 19, or during the alleged phone calls on March 22. Rather, the report states only that Vega threatened him on March 19, and, as noted, makes no mention of any threats having been made to him on March 22. Nor does the report mention a purported harrassing visit by Vega to Morales' home which the Respondent, on brief, contends was a factor in Pomar's decision to discharge Vega (R. Br.:49.) Morales, it should be noted, never testified to any such visit by Vega.

[40] Vasquez' discharge letter, signed by Guerra, reads as follows: "By this means, we notify you effective today, April 16, 2001, we are terminating your services as an employee of Aljoma Lumber, Inc."

discharged "for being disrespectful to his co-workers" and allegedly because of what Santiago had reported to him. (IV:831; 834; V:33.)

Vazquez testified that at the end of the day on April 16, as he went to pick up his paycheck, he was given the discharge letter without any explanation. He did not identify the individual who gave him the letter. He claims that he, accompanied by Colon, went to see Valenzuela to inquire as to the reason for his discharge, and that Valenzuela, who was Vazquez' immediate supervisor, stated he did not know why Vazquez had been fired (III:428–429). Vazquez' termination letter, as noted, gives no explanation for the discharge. Although Pomar claims to have made the decision to discharge Vazquez, the discharge letter, as further noted, is signed by Guerra, not Pomar. Guerra, who testified at the hearing, was not questioned about the discharge.

III. ANALYSIS AND CONCLUSIONS

A. The 8(a)(1) Allegations

1. Valenzuela's October, 2000 remark to Sanabria

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act when Valenzuela, as claimed by Sanabria, instructed him, and employees "Juan" and "Alexander" on or about October 11, 2000, to let him know if they voted against the Union so that he (Sanabria) could convey that information to Guerra. The Respondent contends that whatever alleged unlawful statements Sanabria's claims were made to him by Valenzuela, cannot be imputed to Aljoma because Valenzuela was neither a statutory supervisor nor its agent when the statements were purportedly made. The General Counsel counters that Valenzuela was in fact Respondent's agent under Section 2(13) when he made the above remarks, rendering the Respondent liable for his comments.[41] I find merit in the Respondent's contention.

An employer's liability under the Act for the conduct of another is, under Board law, determined in accordance with the principles of the law of agency. "The crucial and determining factor in the establishment of an agency relationship concerns the authority of the alleged agent to act as an agent in a given manner for the alleged principal." *Alliance Rubber Co.*, 286 NLRB 645, 648 (1987). "Authority to do an act can be created by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account." *Wometco-Lathrop Co.*, 225 NLRB 686, 687 (1976), citing Restatement 2d, Agency §26 (1958). In determining what constitutes apparent authority, the Board applies the standard endorsed in *Dentech Corp*., 294 NLRB 924, 925 (1989). See, also, *Dick Gore Real Estate*, 312 NLRB 999 (1993). In *Dentech*, the Board, quoting from *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82 (1988), described apparent authority in the following manner:

> "Apparent authority is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question. (Citations omitted) Thus, either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this conduct is likely to create such a belief. (citation omitted) Two conditions, therefore, must be satisfied before apparent authority is deemed created: (1) there must be some manifestation by the principal to a third party, and (2) the third party must believe that that the extent of the authority granted to the agent encompasses the contemplated activity."

The burden of proving the existence of an agency relationship rests with the party asserting the relationship, in this case, the General Counsel. *EPI Construction*, 336 NLRB 234 (2001). The latter, in my view, has not met that burden here. Valenzuela, as noted, was an independent contractor in charge of security at Aljoma when the October 2000 remarks attributed to him by Sanabria were allegedly made. The General Counsel has produced no evidence, credible or otherwise, to show that, during the period in question, Valenzuela's role was anything other than managing security for the Company, or that Valenzuela was explicitly or implicitly authorized by the Respondent to speak or act on its behalf on matters outside of and unrelated to his normal security functions. Nor has it been shown that following the Union's arrival on the scene, the Respondent, either through word or deed, conveyed to employees the impression, or otherwise led them to believe, that Valenzuela was authorized to speak for it regarding union matters.[42] Indeed, testimony by employee Vasquez strongly suggests that he and other employees viewed Valenzuela as their, not Aljoma's, spokesperson. (Tr. 440–441.) Thus, assuming the truth of Sanabria's claim that Valenzuela asked him and two other employees in October 2000, to tell him how they voted in the Board election, the record fails to establish that Valenzuela was acting as agent of the Respondent when he made his alleged remarks. Accordingly, complaint allegation that the Respondent, through Valenzuela, violated the Act by making such remarks is found to be without merit.

2. Pagan's questioning of Morales

The General Counsel contends that Pagan unlawfully interrogated Morales when he asked the latter whether or not he supported the Union. The questioning of an employee regarding his or her union sympathies does not constitute a per se viola-

[41] The General Counsel, on brief, does not contend that Valenzuela was a supervisor within the meaning of Sec. 2(11) of the Act when he made his remarks. (GC Br. 53–55.)

[42] The General Counsel's claim, on brief (GC Br. 20), that Guerra "agreed that Valenzuela would try to find out about the organization movement," is based on a mischaracterization of Guerra's testimony, for Valenzuela, as per Guerra's testimony, appears simply to have responded to Guerra's inquiry of what he might have heard about the Union by telling Guerra that he did not know anything about it and would check with his guards to see if they had heard anything. (IV:740.) I do not view this exchange between the two as constituting a directive by Guerra to Valenzuela to question employees about their union sympathies or activities. In this regard, it is not clear from the record if, when this exchange occurred, the guards were still employed by Valenzuela or in the Respondent's employ.

tion of Act. Rather, the test for determining when an unlawful interrogation has occurred is whether, under all the circumstances, the alleged interrogation reasonably tends to restrain, coerce, or interfere with the employees in the exercise of rights guaranteed them under Section 7 of the Act. *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); also, *Demco New York Corp*., 337 NLRB 850 (2002). Under this totality of circumstances approach, the Board considers factors such as whether the interrogated employees is an open and active union supporter, the background of the questioner, and the place and method of the interrogation.

While evidence regarding the circumstances surrounding the questioning of Morales is somewhat sparse, I am nevertheless convinced that Pagan's inquiry into Morales' Union sympathies was unlawful. Pagan was an admitted supervisor when he questioned Morales. For his part, Morales, as noted, had been identified in the Union's October 3, 2000 letter to Guerra as a union leader. However, there is no evidence to indicate that Morales ever openly demonstrated his support for the Union, or, for that matter, that he was aware that his support for the Union had been disclosed to Respondent. Indeed, given Colon's instruction to employees that they should keep their union activities hidden from Respondent to avoid retaliation, Morales could reasonably have expected and believed that his activities on behalf of the Union were not known to the Respondent. In these circumstances, Pagan's questioning of Morales would have convinced the latter that the Respondent was aware that union activity was afoot at the facility, and that disclosure of his union sympathies to Pagan might have adverse consequences for him. Pagan's questioning of Morales, which the record shows lacked any legitimate basis and obviously was not undertaken in jest, amounted to, in my view, an unlawful interrogation and a violation of Section 8(a)(1). I so find.

3. The statements directed at Jonathan Gonzalez by Guerra and Pagan

The General Counsel contends, and I agree, that Guerra's and Pagan's January 2001 remarks to Gonzalez violated Section 8(a)(1) of the Act. Neither Guerra nor Pagan, as noted, denied making the remarks. Guerra's admonition to Gonzalez, that he should think about his family because no one was going to help him keep his job, made in connection with Guerra's remark that he knew what was going to happen in the Board election scheduled to be held just a few days later, was, in my view, a not-so veiled threat that Gonzalez' support for the Union might very well jeopardize the latter's continued employment with Aljoma and, hence, his ability to provide for his family. Guerra, I am convinced, sought to drive home this point by stating that Colon and the other individuals discharged in September 2000 would not be rehired regardless of what he (Gonzalez) and other employees might have been led to believe presumably by the Union. Further, having threatened Gonzalez with possible discharge if the Union were to win the upcoming election, Guerra, in a classic "carrot-and-stick" approach, implicitly promised to provide Gonzalez and other employees with medical benefits. The message to Gonzalez could not have been clearer: rejection of the Union carried with it rewards, while support for the Union could have dire consequences, including a loss of jobs. This very message was again conveyed to Gonzalez by Pagan when the latter threatened that the Respondent would fire all its employees and close its doors if employees chose to support the Union. As evident from Jose Gonzalez' credited testimony, Pagan, in November 2000, made a similar threat to Jonathan Gonzalez when he told the latter that employees would be fired if they were to bring in the Union. Guerra's and Pagan's threats and promise of benefits were, I find, clearly coercive and, as stated, violations of Section 8(a)(1) of the Act. *Massachusetts Coastal Seafoods, Inc*., 293 NLRB 496, 498 (1989); *Maxi City Deli*, 282 NLRB 742, 745 (1987); *St. John's Construction Corp.*, 258 NLRB 471, 476 (1981).

B. The 8(a)(3) Allegations

1. The September 27–28 layoffs

The General Counsel contends that the discharge of employees Colon, Almodovar, Padilla, Valentin, Maldonado, and Barrieras on September 27 and 28, resulted from their involvement with the Union and was therefore unlawful under Section 8(a)(3) and (1) of the Act. The Respondent, on the other hand, contends that the six employees were lawfully laid off for economic reasons. I find merit in the General Counsel's contention.

In deciding whether an employee's discharge was motivated by legitimate or discriminatory reasons, the Board utilizes the causation test set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB* v. *Transportation Management Corp*., 462 U.S. 393 (1983),[43] as modified in *Office Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 276-278 (1994); see, also *Rose Hills Co*., 324 NLRB 406, fn. 4 (1997). Thus, under the *Wright Line* causation test, the General Counsel must show by a preponderance of evidence that protected activity was a motivating factor in the Respondent's decision to discharge the employee. Thus, the General Counsel must show that the employees engaged in union activity, that the Respondent had knowledge of that activity, and that the Respondent harbored antiunion animus, and that the discharge was motivated by said animus. Once the General Counsel has made the required showing, the burden shifts to the Respondent to demonstrate that it would have taken the same action even in the absence of the protected union activity.

The record makes clear that prior to their September 27, 28 layoffs, all six alleged discriminatees had engaged in union activity for, as previously discussed, on September 20, all six signed authorization cards on behalf of the Union, and most, if not, all attended union meetings held by Figueroa. It is not, however, clear that the Respondent knew, or had reason to know, of their activities in this regard, or, for that matter, that it was even generally aware of the Union's organizational campaign, when the layoff decision was made on September 26.

[43] The Court in *Office Workers' Compensation Programs v. Greenwich Colleries*, 512 U.S. 267, 276–278 (1994) modified *NLRB v. Transportation Management Corp*., supra to reflect that the General Counsel's burden is one persuasion.

The only direct evidence of employer knowledge cited by the General Counsel to support this element of his prima facie case is Pagan's testimony that he participated in the layoff decision, and that said decision was made on September 27, after, and in response to, Guerra's receipt by fax that same morning of Figueroa's September 25 letter notifying Guerra of the employees' interest in union representation. But, as previously found, Pagan's testimony in this regard was not at all credible. Rather, as further found, Guerra's and Pomar's credited and mutually corroborative testimony reflects that Pagan took no part in the September decision to lay off the six alleged discriminatees, and that said decision was made not on September 27, but rather on September 26, one day prior to Guerra's receipt of the Union's letter.[44]

It should be noted that the lack of direct evidence of employer knowledge does not necessarily preclude the finding of a prima facie case, for it is well-settled that "knowledge of the employee's protected activity need not be established directly, but may rest on circumstantial evidence from which a reasonable inference of knowledge may be drawn." *Hospital San Pablo, Inc.*, 327 NLRB 300 (1998); *Three Sisters Sportswear Co.*, 312 NLRB 853, 873 (1993). In the case at hand, however, there is simply no evidence from which such an inference can properly be drawn. Admittedly, the timing of the layoff decision, one day prior to the Respondent being notified by the Union of the employees' interest in organizing, seems somewhat suspicious. However, absent evidence showing, for example, that employees carried out their union activities in such an open and overt way that the Respondent could not reasonably have avoided knowing that union activity was taking place, the suspicious timing of the layoff decision alone would not be sufficient to support such an inference. See, e.g., *Bryant & Cooper Steakhouse*, 304 NLRB 750 (1991); A. *J. Schmidt Co.*, 269 NLRB 579 (1984). Here, Colon's testimony that he instructed employees to conceal their union activities from from the Respondent, and his further testimony, corroborated by other employee witnesses at the hearing, that the card-signing activity and union meetings all occurred off company property, makes it highly unlikely that the Respondent would have known of their activity on September 26, when the layoff decision was made.

In short, the General Counsel, I conclude, has not made a prima facie showing that the September 27, 28, layoffs of alleged discriminatees Colon, Almodovar, Valentin, Maldonado, Barrieras, and Padilla was motivated by antiunion considerations. However, even if the General Counsel had been able to overcome this initial hurdle, the weight of the evidence convinces me that these six individuals would have been laid off when they were even if they had not engaged in union activity. Thus, testimonial evidence from Guerra, Pomar, and Flinn, all of which is undisputed and accepted as true, reflects that the Respondent had been downsizing its operations for some time due to financial difficulties, and that the Respondent was expected to conduct a reduction in force by the end of September. Guerra and Pomar both credibly explained that September 27, was selected as the layoff date because it coincided with the last payroll date for the month of September and would comply with the instructions from headquarters that the reduction in force be carried out by the end of September. (IV:734; IM:810–811). Further, the record reflects that the layoffs were not unusual as the Respondent had conducted similar layoffs in the past. In light of these facts, I find that the Respondent has demonstrated that the layoffs were motivated by legitimate, economic reasons, thereby effectively rebutting any prima facie case the General Counsel might have been able to establish. Accordingly, the allegation that the layoffs were unlawfully motivated is found to be without merit.

2. The October 28, 2000, discharge of Noel Cruz

The General Counsel has made a prima facie showing sufficient to support an inference that Cruz' discharge was motivated by antiunion animus. Thus, Cruz testified, and the record shows, that he signed a union authorization card on September 20, 2000, and that he participated in three union meetings (II:254–255; GC Exh. 12[a]). It is also clear that the Respondent must have known of Cruz' involvement with the Union prior to discharging him on October 28, for the October 3, letter sent by the Union to Guerra specifically named Cruz and several other employees as the Union's leaders and supporters. (See GCX-4[B].)[45] Further, Guerra's remark to Figueroa during their September 27, phone conversation, that he would prefer to shut down the facility than to deal with a union, and the above-described unlawful conduct engaged in by Respondent upon learning of its employees' interest in union representation, which included Pagan's interrogation of Morales union sympathies and threat to Gonzalez that the Respondent would close its facility and discharge all employees if the Union were brought in, Guerra's similar threat to Gonzalez that bringing in the Union might jeopardize the latter's continued employment, and his implied promise to improve employee benefits if they rejected the Union, provide ample proof of Respondent's antiunion animus.[46] Finally, the fact that Cruz was discharged allegedly for refusing to take the dog to the vet when no employee had ever before been disciplined, much less discharged, for similar refusals, reasonably supports an inference that the discharge may very well have been motivated by some other, unlawful reason. Sears, *Roebuck & Co.*, 337 NLRB No. 65 (2002). On these facts, I find that the General Counsel has met his initial Wright Line burden of proof. The burden now shifts to the Respondent to demonstrate that Cruz was discharged for a le-

[44] The only other evidence of record suggesting the possibility that the Respondent's knowledge of its employees' union activities may have preceded the September 27 layoff decision is Rodriguez' rejected claim of having been told by Guerra that the layoff of the six individuals on September 27 occurred after Guerra learned of the Union's interest in organizing its employees.

[45] Contrary to the Respondent's claim on brief, GC Exh. 4 does not state that "all employees" of Aljoma were "leaders" of the Union (R. Br. :40.) Rather, GC Exh. 4 specifically identifies the Union leaders by name, Cruz being one of them.

[46] While the complaint does not allege Guerra's September 27, comment to Figueroa as a separate violation, Guerra's representation that he was willing to take the drastic step of closing the facility before dealing with a union clearly reflected the high degree of animosity he held towards unions in general, and consequently to the Union herein.

gitimate, nondiscriminatory reason and that his discharge would have occurred even if Cruz had not taken part in any union activity.

The Respondent contends, on brief, that Cruz was not discharged for his union activities or simply for refusing to take the dog to the vet, but rather was terminated for his entire course of conduct preceding the discharge which included repeated refusals to comply with Guerra's directive that he take the guard dog to the vet, prompting the first warning, his disrespectful and threatening behavior towards Guerra allegedly prompting a second warning, and his challenge to Guerra to fire him. (RB:44.) The credible evidence of record does not bear out the Respondent's claim. Initially, Cruz and Guerra provided very different versions of what occurred just prior to the discharge. Cruz, as previously noted, recalls Guerra telling him that because Cruz now belonged to the Union, he would have to take the dog to the vet, and that when he declined to sign, without reading, the warning issued to him for refusing to comply with Guerra's instructions, the latter immediately discharged him. Guerra, on the other hand, admits issuing Cruz a warning for refusing to take the dog to the vet, but claims that a second warning was issued to Cruz for being "disrespectful," and that he discharged Cruz only after this second warning was issued and after Cruz dared Guerra to fire him.

As between Cruz and Guerra, I found Cruz to be the more credible witness and accept his version of the events leading up to his discharge. Thus, I find that Guerra did tell Cruz that because he now belonged to the Union, Cruz would have to take the dog to the vet, and that he discharged Cruz only after Cruz refused to do so and after he refused to sign the warning issued to him for disobeying Guerra's instruction. I do not believe Guerra's assertion that Cruz became loud and disrespectful during the meeting resulting in a second warning, or that Cruz challenged Guerra to fire him. In rejecting Guerra's testimony, I note that Cruz' quiet and demure demeanor simply did not square with Guerra's depiction of him as a loud and threatening individual. As to the alleged second warning Guerra claims was issued to Cruz for being disrespectful, Cruz, as noted, made no mention in his testimony of having received a second warning, nor was any such warning ever produced at the hearing. The Respondent could easily have refuted Cruz' version, and corroborated Guerra's account, including his claim of having issued a second warning to Cruz and of having been dared by the latter to fire him, through Pomar who, as noted, testified extensively on other matters, including the discharge of other individuals, and who, according to both Cruz and Guerra, was present throughout the meeting. As noted, however, the Respondent never questioned Pomar about the events surrounding Cruz' discharge, warranting an inference that the Respondent chose not to do so for fear that any such testimony by Pomar would not help its case. Accordingly, the Respondent's claim that Cruz was disrespectful to or insubordinate with Guerra, that he was issued a warning for such behavior, and that his discharge was based in part on such behavior, lacks credible evidentiary support and is rejected.

Nor do I believe that Cruz was discharged for refusing to take the guard dog to the vet, for the record, as noted, reflects that Colon and Maldonado had, in the past, also refused similar instructions but were never disciplined or discharged for such conduct. The Board has found that evidence of a blatant disparity in treatment is sufficient to support a prima facie case of discrimination. *Sears, Roebuck & Co*., 337 NLRB No. 65 (2002) The Respondent nevertheless argues that Colon's and Maldonado's refusals cannot be compared to Cruz' conduct, noting in this regard that "the record is totally silent as to what measures, if any, were taken by the company" against Colon and Maldonado for their refusals. The Respondent is mistaken in this regard, for both Colon and Maldonado testified, without contradiction, that they were never disciplined for their conduct.[47] I am convinced that Guerra simply used Cruz' refusal to take the dog to the vet as an excuse to rid himself of one of the Union's leaders and supporters. Indeed, Cruz' credited assertion, that Guerra directed him to take the dog to the vet because he was now part of the Union, suggests that Guerra may very well have been trying to set up Cruz for possible disciplinary action if he refused to comply. I find it highly unlikely, given the lack of discipline imposed on Colon and Maldonado for their own prior refusals, that Cruz would have been discharged, or even disciplined, for not complying with Guerra's request if he had had no involvement with the Union.[48] In short, I find that the Respondent has presented no credible evidence to rebut the General Counsel's prima facie case. Accordingly, I find that Cruz was discharged for his union activity and not for refusing to take the dog to the vet or for insubordination, and that said discharge violated Section 8(a)(3) and (1) of the Act.

3. The March 12, 2001 "forklift" warnings

On March 12, 2001, the Respondent, as noted, issued two disciplinary warnings each to Vega and Vazquez for violating a Company rule prohibiting the use of forklifts to carry passengers. Vazquez' first warning was for carrying Vega on a forklift driven by him, while Vega's first warning was for riding as a passenger on the forklift driven by Vazquez. The second warning issued to both was for smiling at Alvarado in a mocking fashion as the latter sought their compliance with the Company's forklift rule.

[47] The Respondent further seeks to distinguish Colon's refusal to care of the dog from Cruz' own conduct by noting that unlike Cruz, Colon "changed his mind and took care of the dog." Colon indeed testified that he "eventually" took care of the dog simply because he felt sorry for it. There is, in this regard, no evidence that Colon had been threatened with discipline if he did not comply with Pagan's request to care for the dog. Indeed, his testimony suggests that his decision to care for the dog resulted from his empathy for the animal, not because he feared discipline. Finally, the record does not make clear just when Colon changed his mind about the dog, although his claim that he "eventually" did so leads me to believe that it did not occur immediately after being instructed by Pagan. What is clear, however, is that Colon did initially refuse to comply with Pagan's order to take care of the dog and was never disciplined for it.

[48] The Respondent's claim, that Cruz' discharge is more in line with the discharge of two employees, Gerardo Gonzalez and Jorge Vazquez, for refusing to comply with direct orders and for insubordination (See R. Exhs. 18–19), is without merit for, as previously found, Cruz was never insubordinate with Guerra prior to his discharge. Further, while the Respondent claims that both Gerardo Gonzalez and Jorge Vazquez were discharged, R. Exh. 18 and R. Exh. 19 reflects only that the latter were "suspended," and not, as in Cruz' case, discharged.

While not denying that an incident involving the use of forklifts occurred on March 12, the General Counsel nevertheless contends that the real reason for the warnings issued to Vega and Vazquez that day stemmed from their involvement with the Union, and not from their alleged violation of the Company's rule prohibiting passengers on forklifts.[49] In support thereof, the General Counsel points to testimony showing that employees often rode as passengers on forklifts, at times observed by supervisors, without being disciplined for such conduct.

The General Counsel, I believe, has met his Wright Line burden of showing that the March 12 warnings were motivated if not wholly, at least in part, by Vega's and Vazquez' union activity. There is no question that both Vega and Vazquez were union supporters and activists and that the Respondent had knowledge their involvement with the Union. Thus, Vega and Vazquez both signed union authorization cards and attended union meetings in September 2000, were identified in the Union's October 3, 2000, letter to Guerra as Union "leaders," and were on the Union's bargaining team which was engaged in contract talks with the Respondent at around the time the forklift incident occurred. Further, the unlawful termination of Cruz because of his involvement with the Union, as well as the other unlawful conduct engaged in by the Respondent (described above in connection with Cruz' discharge), provides ample evidence of its antiunion animus.

The Respondent's defense is largely based on Alvarado's version of events, which, as previously discussed, is wholly at odds with Vega's and Vazquez equally divergent accounts. I have, as noted, credited Alvarado's testimony as to what transpired on March 12 and conversely rejected Vega's and Vazquez' version of the incident. As already found, Alvarado's credited testimony thus shows that on the morning of March 12, Alvarado observed Vazquez operating a forklift while carrying Vega and Rivera as passengers and that, after stopping them, he asked Vega and Rivera to step down. It further shows that while Vega and Rivera initially complied with Alvarado's instructions, Vega became upset at something Alvarado said to him, changed his mind, stated aloud, "To hell with it, I'm not going to walk to breakfast, I'm going to go," and jumped back on the forklift, as did Rivera. In apparent disregard of Alvarado's instructions, the three individuals continued on their way with Vega and Rivera riding as passengers on the forklift driven by Vazquez.

The General Counsel, as noted, suggests that because employees have, in the past, ridden as passengers on forklifts and not been disciplined, the disparate treatment accorded to Vega and Vazquez essentially for the same conduct renders the warnings pretextual and supports a finding that they were discriminatorily motivated. While, as previously discussed, a blatant disparity in treatment may be sufficient to support a prima facie case of discrimination, Sears, Roebuck & Company, supra, I do not agree with the General Counsel here that Vega and Vazquez were disparately treated. Thus, Alvarado, while admitting that he has in the past observed employees riding as passengers on forklifts, credibly explained that prior to the March 12 incident, he has not had to issue written disciplinary warnings to employees for such conduct because when caught doing so, employees immediately complied with his instructions and removed themselves from the forklift, rendering discipline unnecessary. By contrast, in the present situation, Vega, Rivera, and Vazquez deliberately, and in my opinion insubordinately, chose to disregard Alvarado's directive and drove away. It was their deliberate conduct in ignoring his instructions and in openly mocking him as they drove away, which Alvarado further explained, prompted him to issue the warnings to Vega and Vazquez. I am convinced that had they simply complied with Alvarado's directives, no warnings would have been issued. Thus, I am persuaded that union activity played no role in the March 12 warnings issued to Vega and Vazquez, and that the Respondent would have issued them the warnings even if they had not engaged in any union activity. I therefore find that the Respondent has rebutted the General Counsel's prima facie case and shall recommend dismissal of this allegation.

4. The March 16, 2001 warnings/suspensions of Barrieras, Vega, and Vazquez

As previously discussed, on March 16, 2001, alleged discriminatees Barrieras and Vazquez received warnings allegedly for calling Morales a "toad." Vazquez received his warning allegedly for the same offense on March 19. Barrieras received only a written warning, while Vega and Vazquez both received a warning as well as a suspension for the same incident. The General Counsel contends, and the Respondent denies, that the warnings issued to the three, and the suspensions issued to Vega and Vazquez, resulted from their involvement with the Union and motivated by antiunion animus.

The General Counsel, I find, has made a prima facie showing sufficient to support an inference that the actions taken against Barrieras, Vega, and Vazquez on March 16, 2001 were discriminatorily motivated. The record reflects that all three employees participated in the Union's initial organizational efforts that began in early September, 2000, by signing union authorization cards and attending union meetings which were held during that time period. It further shows that the Respondent must have known of their involvement with the Union for all three individuals, like Cruz, were identified in the Union's October 3, 2000 letter to Guerra as leaders and supporters of the Union. (GC Exh. 4 [B].) Moreover, Vega and Vazquez were on the Union's bargaining committee which was engaged in contract talks with the Respondent just prior to the issuance of their warnings. Their open and active support for the Union, therefore, would have been well-known to the Respondent. Finally, the unlawful conduct engaged in by the Respondent, discussed above in connection with Cruz' discharge, as well as the unlawful discharge of Cruz for his union sympathies, amply supports a finding of antiunion animus on the part of the Respondent.

The Respondent contends that Barrieras, Vega, and Vazquez were lawfully disciplined for being disrespectful to Morales by calling him "toad," that Barrieras received only a written warning because he adopted a more conciliatory tone and was willing to apologize to Morales for his behavior, while Vega and Vazquez received suspensions in addition to the warnings because they purportedly had engaged in similar conduct in the

[49] The General Counsel, on brief, appears to concede the existence of such a rule (GC Br. :47.)

past and been verbally warned against any such future misconduct. (RB:48.) Its contention is in large part based on Pomar's testimony. While there is no disputing that an incident occurred, Pomar's stated reason for issuing the warnings was not convincing.

Pomar, it should be noted, did not witness the incident himself. Instead, he accepted as true Morales' accusation that Barrieras, Vega, and Vazquez had been disrespectful to him on March 15 by calling him "toad" because Morales' account had purportedly been corroborated by Valenzuela, who, Pomar claims, witnessed the incident firsthand. There is, however, no evidence, other than Pomar's above unsubstantiated claim, that Valenzuela was in fact present when the incident occurred and heard the three employees calling Morales "toad." Indeed, the record, if anything, suggests just the contrary, for Morales' own testimony, as noted, reflects that Valenzuela was inside his office when the incident occurred and came outside to find out what was going on only after hearing Morales complaining to Colon about the alleged name-calling. Valenzuela, as noted, was never called to explain what he may have heard or seen that day, or to otherwise confirm Pomar's claim that he (Valenzuela) witnessed the incident. Accordingly, I reject as not credible Pomar's assertion that Valenzuela corroborated Morales' version of events. Rather, I find that Pomar relied only on what Morales may have told him that day in deciding to issue the disciplinary warnings to Barrieras, Vega, and Vazquez, and to suspend the latter two for several days.

t is undisputed that on March 15 the term "toad" was being bandied about by employees at the facility, for Morales, as well as Barrieras, Vega, and Vazquez are in agreement on this point. Their agreement, however, ends there for Barrieras, Vega, and Vazquez, as noted, deny Morales' claim that they took part in calling him "toad" that day. Despite the obvious discrepancy between Morales' accusation and Barrieras', Vega's, and Vazquez' professions of innocence, Pomar never questioned or interviewed any of the three employees about the incident, nor did he afford them an opportunity to at least personally express their denials of Morales' accusation to him before disciplining them. Instead, Pomar simply chose to accept Morales' accusation as true. His stated reason for not allowing the three employees to present their side of the story—that Valenzuela had personally witnessed the incident and thus corroborated Morales' account—was, as noted, rejected as not credible. "An employer's failure to adequately investigate an employee's alleged misconduct has been found to be an indication of discriminatory intent." *Hickory Creek Nursing Home*, 295 NLRB 1144, 1159 (1989); *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988). Here, Pomar's failure to fully and fairly investigate Barrieras', Vega's, and Vazquez' alleged misconduct, or even to provide them with an opportunity to rebut the accusation made against them by Morales, suggests the presence of discriminatory motivation.[50] See, e.g., *Denholme & Mohr, Inc*., 292 NLRB 61, 67 (1988); also, *Tasty Baking Co*., 330 NLRB 560, 574 (2000); *Traction Wholesale Center Co*., 328 NLRB 1058, 1072 (1999); *Pitt Ohio Express, Inc*., 322 NLRB 867, 870 (1997).

However, assuming, arguendo, that Morales' accusation was true and that Barrieras, Vega, and Vazquez on March 15 did in fact call him a "toad," I am not convinced that the Respondent would have disciplined these employees solely for this name-calling incident. Thus, all three testified, credibly without contradiction and, indeed, with some corroboration from Morales himself, that the term "toad" was frequently used by employees to describe each other.[51] Yet, there is no evidence that any employee was ever given a warning or otherwise disciplined for calling Morales, or possibly some other employee, a "toad" or some other less attractive name.[52] The lack of such evidence leads me to believe that name-calling was, in fact, a common practice among employees that the Respondent had, prior to March 15, knowingly tolerated, if not condoned. Thus, even if Barrieras, Vega, and Vazquez did engage in name-calling on March 15, the Respondent's apparent willingness to tolerate such conduct in the past leads me to conclude that it would not have issued warnings and/or suspended Barrieras, Vega, or Vazquez solely on the basis of their name-calling behavior that day. The Respondent's failure to credibly explain why it chose to punish these three individuals for conduct that it had previously condoned, and its failure to investigate the incident or to so much as allow Barrieras, Vega, and Vazquez an opportunity to present their side of the story, supports an inference that the reason proffered by Respondent for the disciplinary action taken is a pretextual one, and that the true reason is an unlawful one which the Respondent seeks to conceal. *A-1 Portable Toilet Services*, 321 NLRB 800, 806 (1996).[53] Having failed to provide a credible explanation for the warnings and/or suspensions issued to Barrieras, Vega, and Vazquez on March 16, the Respondent, I find, has not rebutted the General Counsel's prima facie case. Accordingly, the March 16, warnings and/or suspensions issued to these named three discriminatees were, as alleged by the General Counsel, unlawful and in violation of Section 8(a)(3) and (1) of the Act.

[50] Although Barrieras received a lighter punishment, e.g., a warning only but no suspension, the reduction in sentence came after he had already been informed by Valenzuela that he was receiving a warning and a suspension for calling Morales a "toad." Notification of the warning and suspension to Barrieras occurred before Valenzuela heard from the former about the incident.

[51] Morales, for example, acknowledged having been called "toad" on several prior occasions. Indeed, he admitted that he has "always" been called "toad" (See transcript at II:352; III:422; 580; IV:633; 636.)

[52] Although the warnings issued to Vega and Vazquez state that both "had been previously warned by...Valenzuela for a similar situation," no evidence of any such prior warnings was ever produced by the Respondent, nor, as noted, was Valenzuela called as a witness to confirm having verbally or in writing warned either Vega or Vazquez about such conduct in the past.

[53] The pretextual nature of the warning and suspension issued to Vazquez for this incident is further evident from the fact that while the warning letter also accused Vazquez of having threatened Morales during the purported name-calling incident, Morales never claimed in his testimony that he had been threatened by Vazquez or that he told Pomar of any such threat from Vazquez during the March 15incident.

3. The individual discharges

(b) Antonio Vega

The General Counsel contends, and I agree, that Vega was unlawfully discharged for his union activities. As discussed above in connection with the March 16, warning and suspension, Vega was a union supporter and activist whose union activities, which included participation on the Union's bargaining committee, were well known to the Respondent. Further, there is, as pointed out in the above discussion of Cruz' unlawful discharge and March 16, unlawful warnings/suspensions to Barrieras, Vega, and Vasquez, clear evidence of the Respondent's antiunion animus. The timing of the March 23, discharge, coming as it did on the heels of the unlawful warning and suspension issued to Vega on March 19, and for reasons having some nexus to the unlawful March 19, warning and suspension, further supports an inference that Vega's discharge was unlawfully motivated by union activity. The General Counsel, I find, has made a strong prima facie showing that Vega's discharge was motivated by antiunion animus, and, in so doing, has properly shifted the burden under Wright Line, supra, to the Respondent to show that it would had discharged Vega even if he had not engaged in any union activity. The Respondent, I find, has not done so here.

Pomar, who made the decision to discharge Vega, claims that he discharged Vega because the latter purportedly threatened Morales on March 19, as the latter, accompanied by Valenzuela, left the Respondent's premises after delivering some workman's compensation documents. The only evidence produced to show that such a threat was made was Morales' testimony which, as noted, has been rejected as not credible. Valenzuela, who might have been able to corroborate Morales' claim that Vega threatened him, as well as Pomar's claim that Valenzuela subsequently reported the alleged threat to him, did not testify, warranting an adverse inference that if called, Valenzuela's testimony would not have been favorable to the Respondent's case. *K-Mart Corp*., 336 NLRB No. 37 (2001); *Jim Walter Resources*, 324 NLRB 1231, 1233 (1997).

As previously noted, the Respondent, on brief (RB:49), contends that Vega's discharge was based on more than just the March 19, threats. Thus, it claims that Vega's subsequent conduct in the days following March 19, consisting of a visit by Vega to Morales' home to harass him, and a phone call made by Vega to Morales threatening to "grab him," were all considered by Pomar in making his decision to terminate Vega on March 23. I find its claim to be without merit, for Pomar testified only that his decision was based on Vega's alleged March 19, threat to Morales which, as found above, never occurred, and made no mention of any alleged harassment visit by Vega to Morales' home, or a threatening phone call from Vega to Morales, as a basis for the discharge. As noted, the alleged harassing visit by Vega to Morales' home referenced by the Respondent in its brief was never mentioned by Morales in his testimony, nor cited in the March 22, report (R. Exh. 9) as conduct purportedly engaged in by Vega. Nor does the report, as noted, reflect that Vega threatened Morales during the phone call Vega made to Morales. I am convinced that the harassing visit alluded to by the Respondent on brief, like the threatening phone call and March 19, threat, never occurred.

Pomar's discharge of Vega for conduct which I have found did not occur, without so much as an investigation into the matter or affording Vega an opportunity to be heard, and without giving him any prior warning or so much as a reason for the discharge, has all the earmarks of a pretext. *Pro/Tech Security Network*, 308 NLRB 655 (1992); *The Troxel Co.*, 305 NLRB 536 (1991).[54] Support for a finding that the reason proffered by the Respondent for Vega's discharge is nothing more than a pretext can be found in the Respondent's attempt on brief to cite additional reasons for the discharge, e.g., a harrassing visit and threatening phone call made by Vega to Morales' home, which were never cited by Pomar, the decisionmaker, in his testimony as grounds for the discharge. Thus, the Board has found that an employer's shifting explanation for a discharge, or its post hoc attempt to rationalize such a decision, are suggestive of a pretext. *Yukon Manufacturing Co*., 310 NLRB 324, 340 (1993); *Bay Metal Cabinets, Inc*., 302 NLRB 152, 173 (1991); *Pepsi Cola Bottling Co. of Norton*, 301 NLRB 1008, 1041 (1991); *H. Treffinger Repair Services*, 281 NLRB 516, 519 (1986).

Having found that the reasons proffered by the Respondent for discharging Vega are pretextual, it follows that the Respondent has not rebutted the General Counsel's prima facie case. Accordingly, I find that the Respondent's discharge of Vega on March 23, 2001 was unlawful and a violation of Section 8(a)(3) and (1) of the Act, as alleged.

(c) Juan Vazquez

Vazquez, as noted, was terminated without warning or explanation on April 16, 2001. While the Respondent contends that Vasquez was lawfully discharged for exhibiting a "threatening and challenging behavior towards fellow employees," the General Counsel argues that Vasquez was unlawfully terminated for his union activities. The General Counsel, in my view, has the better of the argument.

Initially, Vasquez, as discussed above in connection with his March 16, warning and suspension, was an active union adherent whose involvement with the Union, including his role as one of the Union's negotiators during contract talks, was well-known to the Respondent.[55] Evidence of the Respondent's animus towards the Union and its supporters has previously been discussed and need not be repeated here. I am satisfied that the General Counsel has made a prima facie showing sufficient to support an inference that the Respondent's April 16, discharge of Vasquez, like the unlawful warning and suspension issued to him one month earlier, was similarly motivated by antiunion reasons.

[54] The Respondent's failure to explain why it prepared a warning on March 23, to give to Vega for allegedly threatening Morales on March 19, when it presumably was discharging Vega for the same offense that very day, undermines its stated reason for the discharge. The warning, as noted, did not state that Vega was to be discharged but rather simply cautioned Vega that "any other violation or failure to follow the rules will result in a drastic disciplinary action."

[55] Pomar admits having observed Vazquez take part in the contract talks that were going on in March 2001 (IV:833.)

The only explanation for Vazquez' discharge came from Pomar who claims he discharged Vazquez because of employee complaints that Vazquez had been disrespectful to them and that they did not want to work alongside Vazquez (IV:831). Pomar's rather vague and uncorroborated testimony as to why he discharged Vazquez is simply not credible. Pomar himself, for example, never actually received any of the alleged complaints about Vazquez from employees. Rather, he claims the complaints were made to Valenzuela who, quite conveniently for Pomar, did not testify. The failure to call Valenzuela, the one presumably having direct knowledge of such complaints, to corroborate Pomar warrants an adverse inference that if called to testify, Valenzuela would not have backed up Pomar's account. K-Mart Corporation, supra; Jim Walter Resources, supra. Nor did Pomar provide any specifics as to the types of complaints that had been received from employees, testifying only, and rather vaguely, that Vazquez had been "disrespectful" to employees. The Respondent in this regard produced no evidence to show that it had, in the past, disciplined, much less discharged, employees for being disrespectful to other employees.[56] Nor did Pomar, with the exception of one Miguel Santiago, identify the names of any of the complaining employees, or when the complaints were alleged to have been made.[57]

In sum, I find no credible evidence to support Pomar's claim that employees had been complaining about Vazquez' disrespectful conduct towards them, and that it was these complaints which prompted his discharge April 16, 2001. Nor do I believe, given the absence of evidence showing other employees had previously been discharged for such conduct, that Vazquez would have been terminated even if he had been disrespectful to other employees. Rather, I find Pomar's stated reason for Vazquez' discharge to be nothing more than a pretext intended to mask some other, unlawful reason. Pomar's failure to question Vazquez about the alleged employee complaints, to warn him about such conduct, or even to give Vazquez a reason for the discharge, supports an inference that the discharge was unlawfully motivated by his union activity, and not for the alleged misconduct testified to by Pomar. Pro/Tech Security Network, supra; The Troxel Company, supra. Accordingly, I find that the Respondent has not rebutted the General Counsel's prima case, that Vazquez' discharge was unlawfully motivated by his union activities, and that said discharge violated Section 8(a)(3) and (1) of the Act, as alleged.

[56] The Respondent did produce two discharge notices showing the discharge of two employees in 1996 for "insubordination" and "not complying with a direct order." (R. Exhs.18–19.) Clearly, disrespectful behavior of one employee towards another can hardly be equated with insubordination towards a supervisor and the failure to comply with a supervisor's directive.

[57] Santiago did not testify, leaving uncorroborated Pomar's claim about receiving a complaint from Santiago. I do not, in any event, believe Pomar's claim about receiving any such complaint from Santiago about Vazquez.

4. The Section 8(a)(5) and (1) allegations

(a) The unilateral change in work schedule

The General Counsel contends, and I agree, that the Respondent violated Section 8 (a)(5) and (1) of the Act when, on or about February 6, 2001, it unilaterally changed unit employees' work hours from 8 a.m.–5 p.m. to 9 a.m.–6:00 p.m. without giving the Union prior notice or an opportunity to bargain over the change. It is well-established that an employer must notify and bargain with its employees' collective-bargaining representative before implementing changes in its employees' terms and conditions of employment, commonly known as mandatory subjects of bargaining. *NLRB v. Katz*, 369 U.S. 736 (1962).[58] The matter of work schedules or changes in shifts is a mandatory subject of bargaining. *Sheraton Hotel Waterbury*, 312 NLRB 304, 307 (1993); *Tuskegee Area Transportation System*, 308 NLRB 251 (1992); *Our Lady Of Lourdes Health Cente*r, 306 NLRB 337, 339 (1992).

The Respondent's sole defense to this allegation, other than the previously rejected denial in its answer that a change in the employees' work shift had occurred, is that the allegation is time-barred under Section 10(b) of the Act. Its claim in this regard is likewise without merit. Section 10(b) is a statute of limitations and is not jurisdictional in nature. As such, it is an affirmative defense that is deemed waived if not affirmatively pleaded and raised in a timely fashion. Specifically, the 10(b) limitations period must be raised either in the pleadings or at hearing. *Paul Mueller Co.*, 337 NLRB No. 124 (2002); *Newspaper & Mail Deliverers' Union of New York (New York Post)*, 337 NLRB No. 91 (2002); *Continental Winding Co*., 305 NLRB 122, 128 (1991); *Taft Broadcasting Co*., 264 NLRB 185, 190 (1982). Here, the Respondent never asserted Section 10(b) as a defense in its answer to this or any other complaint allegation (GC Exh. 1[p]).[59] Nor was this defense argued or

[58] A union may, of course, waive its statutory right to bargain over a particular mandatory bargaining subject. Such a waiver, however, will not be lightly inferred but rather must be "clear and unmistakable." *Metropolitan Edison v. NLRB*, 460 U.S. 693, 708 (1983.) Thus, for a waiver to be found, "there must be clear and unequivocal contractual language or comparable bargaining history evidence indicating that the particular matter at issue was fully discussed and consciously explored during negotiations, and that the union consciously yielded or clearly and unmistakably waived its interest in the matter." *Hi-Tech Corp.*, 309 NLRB 3, 4 (1992.) The party asserting that a waiver has occurred bears the burden of proving the same.

[59] Respondent, in its answer, denied the unilateral change allegation and, in affirmative defense No. 18 which purports to respond, in part, to this particular allegation, averred only that "[neither Aljoma nor its supervisors and/or agents have ever refused to bargain with the Union nor has it established or changed [sic] any work schedule of the employees in the unit. A change in the working schedule never took place in violation of the Act." It did not contend in affirmative defense No. 18 or elsewhere in its answer that the unilateral change allegation was barred by Sec. 10(b) of the Act. Although the Respondent in affirmative defense No. 19 reserved the right to raise and argue "any other defense not specifically stated herein...," such broad and general language does not, in my view, satisfy the Board's requirement that a Sec. 10(b) defense must be specifically pleaded and raised to be considered timely.

raised by the Respondent at the hearing. Rather, the 10(b) defense is being raised by the Respondent for the first time in its posthearing brief. Under these circumstances, I find that the Respondent's Section 10(b) defense has not been timely raised. *Paul Mueller Co.*, supra. *Newspaper and Mail Deliverers'*, supra. Accordingly, the Respondent's February 6, unilateral change in the unit employees' work shift was, as alleged in the complaint, unlawful and a violation of Section 8(a)(5) and (1) of the Act.

(b) The alleged unilateral institution of a grievance-handling process

The General Counsel further contends, and I agree, that the Respondent unilaterally and unlawfully instituted a grievance procedure when it notified the Union in its March 15, 2001, letter, that any matter to be discussed, including employee grievances,[60] would first have to be discussed with the yard manager or dispatch manager, and that if the steward wished to pursue the matter with Pomar, he would have to make his request known to the yard manager or dispatch manager who would, in turn, notify Pomar of the request. A grievance procedure is a matter related to "wages, hours, and other terms and conditions of employment" within the meaning of Section 8(d) of the Act and thus constitutes a mandatory subject for collective bargaining, such that any unilateral action by the employer with respect to it is unlawful. *P. R. Mallory & Co.*, Inc., 171 NLRB 457, 470 (1968); also, *Pease Co.*, 251 NLRB 540, 550 (1980); *Granite City Steel Co.*, 167 NLRB 310, 315 (1967).

The March 15 letter makes clear that the Respondent did, in fact, instruct the Union on the procedure it expected the union steward to follow when seeking to discuss employee-related matters, including grievances, with management. While not disputing this fact, the Respondent, on brief, appears to raise a waiver defense to this allegation by claiming that the matter of a grievance procedure had been the subject of discussion during the parties' ongoing negotiations towards an initial contract.

As previously noted, a union may be deemed to have waived its statutory right to bargain over a particular mandatory bargaining subject if the matter at issue was fully discussed and consciously explored during negotiations, and the union consciously yielded or clearly and unmistakably waived its interest in the matter. Hi-Tech Corporation, supra. No such waiver, however, can be found here, for there is simply no evidence to show that, during the negotiations which preceded the Respondent's issuance of the March 15 letter, the subject of a grievance procedure was ever discussed or explored by the parties. In this regard, Figueroa testified, credibly and without contradiction, that the grievance procedure established by Respondent in its March 15 letter was never negotiated with the Union. The Respondent appears to concede this point for it acknowledges, on brief, that the grievance procedure promulgated in its March 15 letter was a "totally [sic] new matter" that had not previously been discussed by the parties, and that its decision to institute said procedure was "triggered" by the Union's March 13, letter complaining of Pomar's refusal to meet with Colon to discuss certain memos and an employee-related issue (RB:33). The above facts make patently clear that the grievance procedure established by the Respondent on March 15 was not the product of any negotiations between the parties, but was instead a unilateral act undertaken by the Respondent in response to what the Respondent, on brief, describes as an attempt by Colon to "impose his will" by insisting on meeting directly with Pomar (RB:33). As the grievance procedure established on March 15 was never the subject of any negotiations with the Union, the latter could not be deemed to have waived its right to bargain over the matter. Accordingly, by unilaterally instituting and implementing the grievance procedure without first notifying the Union and giving it an opportunity to bargain over the procedure, the Respondent, I find, violated Section 8(a)(5) and (1) of the Act.[61] That the parties, as claimed by the Respondent, may have subsequently discussed the grievance procedure in negotiations held after March 15 does not negate the finding of a violation, for as a general rule, "an employer's offer to discuss a unilateral change with the union after it is implemented will not be a defense to the unilateral change." *CHS Community Health Systems*, 337 NLRB No. 159 (2002).

CONCLUSIONS OF LAW

1. The Respondent, Aljoma Lumber, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Charging Party Union, Congreso de Uniones Industriales de Puerto Rico, is a labor organization within the meaning of Section 2(5) of the Act, and, since January 22, 2001, has been duly certified as the exclusive collective bargaining representative of the Respondent's employees in the following appropriate unit:

> All fingerlift operators and laborers, including treatment plant fingerlift operators and laborers, yard janitorial employees,

[60] Although the letter does not specifically mention employee grievances, it is apparent from the Respondent's brief that the procedure also applied to grievances (R. Br. 33.)

[61] The Respondent's assertion on brief, that the grievance procedure was never actually implemented, is without merit. First, this particular argument, that the grievance procedure was never implemented, is being raised for the first time on brief and was not asserted as a defense either in Respondent's answer or at the hearing. Thus, in its answer, the Respondent simply denies establishing a grievance procedure, a claim which I have rejected as inconsistent with the weight of the evidence and with Respondent's own assertions on brief. Further, at the hearing, neither Guerra nor Pomar, the two principal management witnesses for the Respondent, claimed that the grievance procedure was never implemented. Nor was any evidence produced to show that the Respondent had, at any time after announcing the grievance procedure in its March 15letter, repudiated this unilateral change, or that it notified the Union that the grievance procedure would not be adhered to. Finally, the Respondent's claim that the grievance procedure was never implemented following its March 15pronouncement is contradicted by Figueroa's testimony, which I credit, that he was told by Colon that the Respondent was dealing with him (Colon) according to the procedure set forth in the Respondent's March 15, and March 20, letters (I:96.) Figueroa's assertion in this regard, made in connection with his testimony about the grievance procedure referenced in the March 15, and March 20, letters, strongly suggests that Colon was being required by the Respondent to adhere to the grievance procedure, and that the grievance procedure had, in fact, been implemented.

equip.m.ent maintenance employees, and laborers employed by the Respondent at its facility in Ponce, Puerto Rico, but excluding all merchandisers, electricians, wood treatment plant operator, all administrative personnel, clerical employees, secretaries, managerial employees, office janitorial employees, messengers, guards, and supervisors as defined in the Act.

3. By interrogating employees about their union sympathies, threatening them with possible loss of jobs if they supported the Union, and implicitly promising to improve their benefits in order to dissuade them from supporting the Union, the Respondent violated Section 8(a)(1) of the Act.

4. By terminating employee Noel Cruz on October 28, 2000, issuing a written warning to employee Josue Barrieras on March 16, 2001, issuing a written warning and suspension to employee Antonio Vega on March 19, 2001, and thereafter discharging him on March 23, 2001, and issuing a written warning and suspension to employee Juan Vazquez on March 16, 2001, and thereafter discharging him on April 16, 2001, the Respondent has violated Section 8(a)(3) and (1) of the Act.

5. By unilaterally instituting and implementing a grievance procedure and by unilaterally changing the unit employees' work hours without affording the Union prior notice of, and an opportunity to bargain over, said changes, the Respondent has violated Section 8(a)(5) and (1) of the Act.

6. The above-described unlawful conduct are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. Except as found herein, the Respondent has not engaged in any other unfair labor practices.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist, and to take certain affirmative action designed to effectuate the policies of the Act.

To remedy the unlawful unilateral changes made in employee terms and conditions of employment, the Respondent shall be required to, at the Union's request, rescind the March 15, 2001 grievance procedure and the February 6, 2001 change made in the employees' shift hours, if it has not already done so, and to bargain with the Union over these and other employee terms and conditions of employment and to embody any understanding reached in a signed agreement. To remedy its discriminatory treatment of employees, the Respondent shall be ordered to rescind the unlawful warnings and/or suspensions issued to Josue Barrieras, Antonio Vega, and Juan Vazquez on March 16, 2001, and the unlawful discharge of Noel Cruz on October 28, 2000, the March 23, unlawful discharge of Antonio Vega, and April 16, unlawful discharge of Juan Vazquez and to, within 14 days from the date of the Order, offer Noel Cruz, Antonio Vega, and Juan Vazquez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed.

The Respondent will also be required to make Noel Cruz, Antonio Vega, and Juan Vazquez whole for any loss in wages and/or benefits they may have suffered as a result of their unlawful discharge and/or suspension, as prescribed in F.W. Woolworth Co., 90 NLRB 289 (1950), with interest as prescribed in New Horizons for the Retarded, 283 NLRB 1173 (1987). Finally, the Respondent will be required to, within 14 days from the date of this Order, remove from its files any reference to the unlawful warnings and/or suspensions issued to Josue Barrieras, Antonio Vega, and Juan Vazquez, and any reference to the discharge of Noel Cruz, Antonio Vega, and Juan Vazquez, and to, within 3 days thereafter, notify each of them in writing that it has done so and that the warnings, suspensions, and/or discharges will not be used against them in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[62]

ORDER

The Respondent, Aljoma Lumber, Inc., Ponce, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally instituting and implementing a grievance procedure and changing employee work shift hours without first notifying Congreso de Uniones Industriales de Puerto Rico, which is the duly certified bargaining representative of the Respondent's employees in the appropriate unit described below, and affording it an opportunity to bargain over those changes. The appropriate unit includes:

All fingerlift operators and laborers, including treatment plant fingerlift operators and laborers, yard janitorial employees, equip.m.ent maintenance employees, and laborers employed by the Respondent at its facility in Ponce, Puerto Rico, but excluding all merchandisers, electricians, wood treatment plant operator, all administrative personnel, clerical employees, secretaries, managerial employees, office janitorial employees, messengers, guards, and supervisors as defined in the Act.

(b) Issuing written warnings to, suspending, discharging, or otherwise discriminating against employees Noel Cruz, Josue Barrieras, Antonio Vega, Juan Vazquez, or any employee for supporting Congreso de Uniones Industriales de Puerto Rico, or any other union.

(c) Coercively interrogating employees about their union sympathies, threatening them with loss of jobs, or promising to improve their benefits in order to discourage support for the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request by the Union, cancel and rescind, if it has not already done so, the grievance procedure and change in employee shift hours, and bargain with the Union, as the exclusive

[62] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

collective bargaining representative of its employees in the above-described unit, concerning these and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Cancel and rescind the March 16, 2001 unlawful warnings and/or suspensions issued to employees Josue Barrieras, Antonio Vega, and Juan Vazquez.

(c) Within 14 days from the date of this Order, offer Noel Cruz, Antonio Vega and Juan Vazquez reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make Noel Cruz, Antonio Vega, and Juan Vazquez whole for any loss of earnings and benefits they may have suffered as a result of their unlawful discharge and/or suspension as set forth in the "Remedy" section of the decision.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Noel Cruz, the unlawful warning issued to Josue Barrieras, and the unlawful warnings, suspension, and discharge of Antonio Vega and Juan Vazquez, and, within 3 days thereafter, notify these employees in writing that this has been done and that the unlawful actions taken will not be used against them in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Ponce, Puerto Rico, copies of the attached notice marked "Appendix."[63] Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 28, 2000.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 29, 2002

[63] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally institute and implement a grievance procedure or make changes in our employees' shift hours, or other terms and conditions of employment, without first notifying and bargaining with the Union, Congreso de Uniones Industriales de Puerto Rico, which is the duly certified exclusive bargaining representative of our employees in the following appropriate unit.

> All fingerlift operators and laborers, including treatment plant fingerlift operators and laborers, yard janitorial employees, equip.m.ent maintenance employees, and laborers employed by the Respondent at its facility in Ponce, Puerto Rico, but excluding all merchandisers, electricians, wood treatment plant operator, all administrative personnel, clerical employees, secretaries, managerial employees, office janitorial employees, messengers, guards, and supervisors as defined in the Act.

WE WILL NOT issue you written warnings, suspend, discriminate against you by issuing you written warnings, suspending you, or discharging you for supporting or engaging in activities on behalf of the Union or any other labor organization.

WE WILL NOT discharge, suspend, issue you written warnings, or otherwise discriminate against any of you for supporting Congreso de Uniones Industriales de Puerto Rico, or any other union.

WE WILL NOT coercively interrogate you, threaten you with loss of employment, or promise to improve your benefits in order to discourage you from supporting the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request from the Union, rescind the grievance procedure we unilaterally established and implemented on March 15, 2001, and the change in employee shift hours, and WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit.

WE WILL, within 14 days of the Board's Order, offer employees Noel Cruz, Antonio Vega, and Juan Vazquez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Noel Cruz, Antonio Vega, and Juan Vazquez whole for any loss of earnings or benefits resulting from their unlawful discharge and/or suspension, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful actions taken against Josue Barrieras, Noel Cruz, Antonio Vega, and Juan Vazquez, and WE WILL, within 3 days thereafter, notify each of them, in writing, that this has been done and that said unlawful actions will not be used against them in any way.

ALJOMA LUMBER, INC.